

Yeshiva University, Cardozo School of Law

LARC @ Cardozo Law

Articles

Faculty

1989

Hegel and the Dialectics of Contract

Michel Rosenfeld

Benjamin N. Cardozo School of Law, mrosnfld@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Law Commons](#)

Recommended Citation

Michel Rosenfeld, *Hegel and the Dialectics of Contract*, 10 Cardozo Law Review 1199 (1989).

Available at: <https://larc.cardozo.yu.edu/faculty-articles/134>

This Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact christine.george@yu.edu, ingrid.mattson@yu.edu.

HEGEL AND THE DIALECTICS OF CONTRACT

*Michel Rosenfeld**

INTRODUCTION

There is a sharp division of opinion concerning the meaning of contemporary contractual relationships. Some believe that contract is dead;¹ others assert that it thrives and that more relationships are contractual today than ever before.² Underlying this division of opinion lurks a fundamental question concerning the proper relationship between individual-regarding and community-regarding values in legitimate contractual relationships. Contract must include both individual and communal aspects.³ Nevertheless, contemporary theories of contract have not only generally failed to harmonize these two aspects,⁴ but also they have not provided adequate guidance for determining an acceptable proportion of communal to individual input in contractual undertakings. Moreover, when viewed in terms of the apparent dichotomy between individual and communal aspirations, contract seems to be but a sharply focused microcosmic instance which is representative of the larger realm of social relationships.⁵ Indeed, not

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. I wish to thank my colleagues David Carlson and Drucilla Cornell for their many useful and insightful comments. Copyright © 1989 by Michel Rosenfeld.

¹ See, e.g., P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979); G. Gilmore, *The Death of Contract* (1974). The principal claim of proponents of the death of contract thesis is not that contractual transactions are in danger of becoming extinct in contemporary society, but that contract law is losing its distinct identity and becoming absorbed into the law of torts. G. Gilmore, *supra*, at 87-90.

² See, e.g., C. Fried, *Contract as Promise* (1981) (systematic analysis of contemporary contractual relationships based on a rejection of the death of contract thesis and on the maintenance of a fundamental distinction between contract and tort); I. Macneil, *The New Social Contract* 71 (1980) ("contract has swept the world").

³ Cf. I. Macneil, *supra* note 2, at 11 (even discrete contract—involving a one-time exchange between otherwise complete strangers—can only take place in a social matrix). On the other hand, there could be no genuine contracts in the absence of a certain minimum of individual-regarding input. See Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 *Iowa L. Rev.* 769, 804 (1985).

⁴ See, e.g., Feinman, *Critical Approaches to Contract Law*, 30 *UCLA L. Rev.* 829, 838-39 (1983) (Modern contract law embodies two modes of analysis—namely, the individualist and the collectivist. Neither mode alone is adequate, both together are contradictory.); I. Macneil, *supra* note 2, at 42 (the inherent conflict in contract roles is between desires to maximize selfish gains and the aspiration to maintain solidarity); Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 561, 618 (1983) (contract viewed in terms of a clash between principle and counter-principle, between individual and community).

⁵ For an extended discussion of the relation between legal contract and macrocosmic relationships viewed in terms of a contractual paradigm, see Rosenfeld, *supra* note 3.

only clearly delineated contractual relationships, but also all kinds of other contemporary social, political, and moral relationships raise the same vexing question concerning the proper relation between individual autonomy and collective goals.⁶

I will argue in this Article that Hegel's theory of contract, in the context of the broader concerns of his legal and political theory, provides the means to resolve this troubling question without leading to the seemingly inevitable pitfalls of individualist and collectivist theories. Specifically, I will suggest that an examination of Hegel's views on contract as a legal device and as the generic relation believed by social contract theorists⁷—but not believed by Hegel⁸—to legitimate the state, in light of certain of Hegel's other writings, reveals the emergence of a particularly powerful model for contractual relationships. I shall refer to this model as the paradigm of *contract as reciprocal recognition*. Under this paradigm, contract is not only compatible with the reconciliation of individual autonomy and communal values, but it is also suited to foster the mutual determination of the individual and—or, perhaps more precisely, against—the communal.

Although contract as reciprocal recognition places both the individual and the community *within* contractual relationships, it cannot consistently recast all social and political norms and relationships as ultimately contractual in nature.⁹ The reason for this should become more apparent following consideration of Hegel's rejection of the social contract as a basis for the legitimacy of the state.¹⁰ In light of Hegel's theory, contract norms—as amalgams produced by the opposition between individual and communal values—can only be under-

⁶ For example, a particularly acute clash between the values of individual autonomy and various communal norms has recently emerged in the context of the debate concerning the constitutional right to privacy. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (homosexual sodomy); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital couple's right to sexual privacy versus state's right to regulate the use of contraceptives).

⁷ For traditional social contract theorists, the social contract provides a justification for the government. Locke assumed that the social contract was an actual historical event. J. Locke, *The Second Treatise of Government* §§ 100-02 (C.B. Macpherson ed. 1980); see J. Gough, *The Social Contract* 140-41 (1957). For Hobbes and Rousseau, on the other hand, the social contract seems to have been a theoretical supposition whose function was to justify the existence of government. J. Rousseau, *The Social Contract* 14-16 (C. Frankel ed. 1947); see J. Gough, *supra*. Finally, for Kant, the social contract was a mere abstract construct, providing a criterion of legitimacy for legal and political institutions. I. Kant, *Kant's Political Writings* 79-80 (H. Reiss ed. 1970).

⁸ See *infra* notes 87-90 and accompanying text.

⁹ See *infra* notes 262-67 and accompanying text.

¹⁰ *Id.*

stood and assessed in terms of noncontract norms.¹¹ Moreover, to the extent that community norms change throughout history, the actual relationship between contract and noncontract should be expected to vary from one epoch to another.¹² Accordingly, the legitimacy and the meaning of contract would also seem to change from one historical period to another. From this it follows that contract today is not likely to be the same as contract in Hegel's time. Nevertheless, Hegel's contribution remains essential for the proper evaluation of contemporary contract. First, Hegel's theory of contract is superior to that of Hobbes, which represents all legitimate intersubjective relationships as ultimately contractual in nature.¹³ Indeed, in light of Hegel's theory, it becomes plain that the Hobbesian conception of the role of contract leads to inevitable and insurmountable inconsistencies.¹⁴ Second, precisely because Hegel's conception of contract as it emerges in the paradigm of contract as mutual recognition short-changes neither the individual nor the community, it can serve as a benchmark against which contemporary contractual relationships can be fruitfully assessed.¹⁵

Any plausible interpretation of Hegel's writings on contract must take proper account of his unique dialectical methodology.¹⁶ Therefore, Part I of this Article discusses relevant methodological issues relating to Hegel's conception of contract to the extent necessary to render the subsequent analysis more fully intelligible. Part II pro-

¹¹ Id.

¹² For example, a society that places great emphasis on individual autonomy as a means to achieve overall welfare would legitimate a much broader range of freely entered into private contractual transactions than a society with a more paternalistic bent. Accordingly, the nineteenth century was more committed to freedom of contract than the twentieth century. See P. Atiyah, *supra* note 1, at 716 (In the last one hundred years there has been a "reversion" from contract to "status."); G. Gilmore, *supra* note 1, at 87.

¹³ Ultimately, for Hobbes, relations between individuals are either relations of hostility (as in the state of nature) or relations of contract. Gauthier, *The Social Contract as Ideology*, 6 *Phil. & Pub. Aff.* 130, 134 (1977).

¹⁴ See *infra* text accompanying notes 37-41.

¹⁵ This point will be further elaborated in the conclusion, *infra* text accompanying notes 303-18. Cf. Benhabib, *Obligation, Contract and Exchange: On the Significance of Hegel's Abstract Right, in The State and Civil Society: Studies in Hegel's Political Philosophy* 159, 174-75 (Z. Pelczynski ed. 1984) [hereinafter *State and Civil Society*]:

Hegel's political philosophy gains a new significance as the current disenchantment with the theory and practice of liberalism on the one hand, and that of orthodox marxism on the other, deepens. . . . [I]f not Hegel's conclusions, then at least his process of reasoning remains vital for today Hegel's political theory is . . . a brilliant attempt to accommodate the demands of modern freedom—autonomy, privacy, and self-expression—within the continuing integrity of a communal structure.

¹⁶ For an excellent and thorough discussion of Hegel's dialectical methodology, see C. Taylor, *Hegel* 225-361 (1975).

ceeds to an interpretation of the meaning of contract for Hegel, focusing principally on the famous passage in the *Phenomenology of Spirit* concerning the struggle for recognition between lord and bondsman,¹⁷ and then on Hegel's views on contract and on the institutions he associates with, or contrasts to, contract in the *Philosophy of Right*.¹⁸

I. THE METHODOLOGICAL BACKGROUND

Modern contract—what Max Weber calls “purposive contract”¹⁹—refers to a relatively simple and invariant generic relationship involving, to use Ian Macneil's definition, “the projection of exchange into the future.”²⁰ Regardless of the identity of the contractors or of the nature of the things to be exchanged, the formal vessel of contractual exchange remains unchanged. The form of contract is highly abstract, and to a large extent contract itself may be abstraction.²¹ But not all transactions that satisfy the formal requirements of contract are ultimately contractual in nature, and not all relationships that are in the last analysis contractual espouse the form of contract.²² Thus, the determination of whether something is a contract, and what its meaning is, is likely to depend at least as much on context as on form.

For Hegel what counts as contract is an abstract right of the abstract person who is the subject of exchange transactions in civil society.²³ Initially, it is not apparent what bearing that may have on

¹⁷ G. Hegel, *Phenomenology of Spirit* paras. 178-96 (A. Miller trans. 1977) (1807) [hereinafter *Phenomenology of Spirit*].

¹⁸ G. Hegel, *Philosophy of Right* paras. 72-81 (T. Knox trans. 1952) (1821) [hereinafter *Philosophy of Right*].

¹⁹ Weber defines the “purposive contract” as “a specific, quantitatively delimited, quality-less, abstract, and usually economically conditioned agreement.” 2 M. Weber, *Economy and Society* 674 (G. Roth & C. Wittich eds. 1968). The paradigmatic purposive contract is the market-oriented exchange contract. *Id.* at 672-74.

²⁰ Macneil, *The Many Futures of Contracts*, 47 S. Cal. L. Rev. 691, 712-13 (1974).

²¹ See L. Friedman, *Contract Law in America* 20 (1965) (“Contract law is abstraction—what is left in the law relating to agreements when all particularities of person and subject-matter are removed.”).

²² A transaction that appears on the surface to be a contract may ultimately not be one in its deep structure, while some relationships that are not contractual in appearance may turn out to be contractual in their deep structure. See Rosenfeld, *supra* note 3, at 808-09. An example of the latter case would be a claim to equal treatment by feminists or members of a racial minority, if such claim were ultimately predicated on some contractarian notion of justice. *Id.* Cf. Gauthier, *supra* note 13, at 161 (The emergence of radical feminism is an expression of an “increasingly overt contractarian consciousness.”).

²³ See *Philosophy of Right*, *supra* note 18, para. 33A (contract belongs to the sphere of abstract right); *id.* paras. 217, 229 (abstract rights, including contract, acquire legal status in civil society); see also Westphal, *Hegel's Radical Idealism: Family and State as Ethical Communities, in State and Civil Society*, *supra* note 15, at 77, 81 (Hegel “portrays civil society as the institutionalization of contractual relationships.”).

the scope of legitimate contractual transactions or on the meaning of contract in the context of Hegel's theory; this is largely due to Hegel's distinctive dialectical methodology. Generally, according to this methodology, nothing which is a part of a larger whole can be understood except in terms of that whole, and conversely, the whole cannot be fully grasped except in terms of the full panoply of determinate relationships that exist among its various constituent parts.²⁴ The meaning of contract, abstract right, and abstract person therefore cannot be fully understood except in terms of the Objective Spirit of which it is a part. And likewise the Objective Spirit cannot be ultimately grasped except in relation to the Absolute Spirit, which represents the culmination of the process whereby the subject progressively acquires full knowledge of the whole²⁵—which amounts to full knowledge of itself, since for Hegel subject and substance are ultimately identical.²⁶

To the extent that whole and part are bound together in organic unity, the meaning of anything cannot be established except in terms of the meaning of everything. This would seem to lead to the following methodological impasse: nothing can be truly said unless everything that is true is said at the same time. Moreover, since for Hegel the internal links that bind the parts together and subsume them under the whole are forged in the course of a dialectical process that unfolds in the course of history, no definitive meaning can be established before the end of history.²⁷ As Hegel states, in the celebrated passage of the *Philosophy of Right*, "[a]s the thought of the world, [philosophy] appears only when actuality is already there cut and

²⁴ See *Phenomenology of Spirit*, supra note 17, para. 20 ("The True is the whole."); id. at 277 ("The whole is a stable equilibrium of all the parts, and each part is . . . at home in this whole . . . because it is itself in this equilibrium with the whole."); see also J. Hippolyte, *Genèse et Structure de la Phénoménologie de L'Esprit de Hegel* 322 (1946) (for Hegel "the Truth is the Whole and . . . each of its moments only acquire meaning in relation to its place in the overall dialectic.") (author's translation); C. Taylor, supra note 16, at 230, 278, 287, 291.

²⁵ Hegel divides the journey of Spirit into three parts. As Charles Taylor summarizes:

The First, Subjective Spirit, deals with what can roughly be called psychology and man's powers as a thinking (individual) being. The Second, Objective Spirit, deals with spirit embodied in human society, and is Hegel's philosophy of history and politics. The Third, Absolute Spirit, touches on the absolute's knowledge of itself, as couched in the three great media of art, religion and philosophy.

C. Taylor, supra note 16, at 351. Moreover, from the perspective of the Absolute Spirit, there emerges a consciousness of the identity between subject and substance, or in other words, between subject and object. See id. at 533. At the stage of Objective Spirit, however, the subject fails to realize that the State and its laws which appear as being objective and independent of her will are, in the last analysis, the embodiment of her own will.

²⁶ See *Phenomenology of Spirit*, supra note 17, para. 60.

²⁷ See C. Taylor, supra note 16, at 390, 465.

dried after its process of formation has been completed."²⁸ Process, therefore, can only be fully understood in terms of its product.

The product severed from its process of formation cannot be understood any more than the process can in the absence of the product. Indeed, in Hegel's system, ontogeny recapitulates phylogeny,²⁹ and the meaning of the whole is produced through integration of the partial meanings yielded by the successive stages of its historical process of formation. In other words, from the limited perspective of each of the successive stages in the process that leads to the end of history, only a partial truth can be generated. The full truth—or in Hegel's terminology, the subject who is for-itself as it is in-itself³⁰—can only be apprehended from the unlimited and unobstructed perspective of the end of history. That full truth, however, is neither independent from the partial truths that precede it, nor intelligible except in relation to them. Instead, the full truth is better envisioned as the reconciliation of the various contradictory partial truths of history from the comprehensive perspective of the subject that has internalized and harmonized the totality of its determinations.³¹

In the *Philosophy of Right*, as in the *Phenomenology* and in the *Logic*,³² Hegel resorts to the same basic method of presentation. He begins with what is only partial and one-sided and endeavors to follow its progressive course towards totality. This course is marked by a series of contradictions leading from one limited perspective to the next until the perspective of the whole is reached. In other words, Hegel starts with what is given immediately and follows it through all the mediating steps through which it must pass to reach the point where it is for-itself as it is in-itself. Further, given this mode of presentation, the meaning of any description of an intermediate stage in the progression towards the whole can only be fully grasped if the movement from the initial stage to the final stage is complemented by a contrary movement starting from the perspective of the whole and traveling in the opposite direction. Thus, for example, from the standpoint of the abstract person whom Hegel introduces in the first

²⁸ *Philosophy of Right*, supra note 18, preface, at 12-13.

²⁹ J. Hyppolite, supra note 24, at 43.

³⁰ See *Phenomenology of Spirit*, supra note 17, para. 29.

³¹ See supra note 24; see also R. Plant, Hegel: An Introduction 190 (2d ed. 1983): [T]he dialectical process is concerned with the unification of contradiction and opposition, transcending the isolated notions of the understanding and connecting them up at a higher and more adequate level, a process which is in turn mirrored in the development of being which also develops through the resolution of opposition and fragmentation.

³² 1 G. Hegel, *Science of Logic* (W. Johnston & L. Struthers trans. 1966); 2 G. Hegel, *Science of Logic* (W. Johnston & L. Struthers trans. 1966) [hereinafter 2 *Logic*].

part of the *Philosophy of Right*, property is an embodiment of her free will.³³ When viewed from the philosopher's standpoint, however, property, unlike mere possession, cannot exclusively be an expression of the will of the abstract individual. Indeed, private property rights, in the last analysis, are only possible if the community recognizes the individual's claim over her possessions.³⁴ What appears at first to depend exclusively on the free will of the individual therefore turns out to need the support of the collective will of the community for its continued survival.

Since for Hegel the relation of part to whole is fully intelligible only in terms of the relation between process and product—in which the process shapes the meaning of the product, while the product settles the meaning of the various stages of the process—the meanings of the concepts, such as contract, which emerge in the course of the dialectical journey towards totality, should in principle be susceptible to full and final determination. Moreover, such determination can be achieved only by a close reading of Hegel's presentation of the process leading from part to whole, coupled with a retracting of the various steps involved from the opposite direction, that is, by starting from the perspective of the constituted whole to shed further light on its antecedent stages.

Within this methodological framework, contract as abstract right cannot be fully understood except through a comprehension of the journey that starts with the abstract person and culminates with the state.³⁵ The scope of contract's legitimacy within Hegel's sociopolitical vision cannot be firmly established without an assessment of the impact of the state—and, in particular, of Hegel's rejection of the social contract as providing an adequate justification for the state³⁶—on contractual relationships and on the role of contract in civil society.

The connection between Hegel's methodology and his conception of contract comes into even sharper focus when it is contrasted to the view of contract that is grounded on a rival methodology, namely that of methodological individualism. This contrast is especially instructive because, although Hegel and the methodological individualist—at least as represented by Hobbes—start from very similar points of departure, they are led to very different conclusions. For Hobbes,

³³ *Philosophy of Right*, supra note 18, paras. 44-45.

³⁴ Id. paras. 51, 51A. Hegel states: "A person puts his will into a thing—that is just the concept of property, and the next step is the *realization* of this concept. The inner act of will which consists in saying that something is mine must also become recognizable by others." Id. para. 51A (emphasis in original).

³⁵ This journey is that covered by Hegel in the *Philosophy of Right*.

³⁶ See *Philosophy of Right*, supra note 18, paras. 75, 75A, 258, 258A.

whose approach to political philosophy is analogous to what the Cartesian method is to epistemology,³⁷ all norms have to be ultimately justified in terms of the individual, and no obligation is legitimate unless it is self-imposed.³⁸ Accordingly, all legitimate legal and political institutions must, in the last analysis, be traceable to the free will of the individual, and all obligations must be ultimately contractual in nature.³⁹ Hobbes's individualism, based on free will and accepting only self-imposed obligations, leads, however, to contradiction. Indeed, Hobbes's social contract, designed to produce a state consistent with individual free will and to exclude obligations that are not self-imposed, yields the effective surrender of all individual rights except the right to self-preservation to an absolute monarch.⁴⁰ Thus, the free will that accepts no restraint except self-restraint in its pursuit of desire ultimately must forfeit its claims to all the objects of its desire except self-preservation.⁴¹

Like Hobbes, Hegel undertakes the journey towards the discovery of suitable legal and political institutions from the standpoint of the abstract free willing subject seeking the satisfaction of desire.⁴² Hegel, however, avoids the contradictory result to which Hobbes is led by incorporating contradiction within the process, and by postulating, as the end result of this process, a state of affairs that fully satisfies the desire of the subject while transcending all previously encountered contradictions.⁴³ Hobbes posits the primacy of the individual over the social, and then finds a device, namely contract, that

³⁷ See J. Merquior, *Rousseau and Weber: Two Studies in the Theory of Legitimacy* 25-26 (1980) ("Thomas Hobbes wanted to put . . . Cartesian rationalism . . . at the service of political thought.").

³⁸ T. Hobbes, *Leviathan* 164 (M. Oakshott ed. 1962) (1651).

³⁹ Cf. T. Hobbes, *Man and Citizen* 222 (B. Gert ed. 1978) (1651) (In state of nature, man has complete liberty; he can do whatever he will.); T. Hobbes, *supra* note 38, at 126 ("For no man is obliged by a covenant, whereof he is not author."); see also Gauthier, *supra* note 13, at 134 (For Hobbes all relations between individuals are either relations of hostility or relations of contract.); Rosenfeld, *supra* note 3, at 858-59 (The pure social theory espoused by Hobbes and Rousseau posits that in the state of nature individuals have an equal right to everything which creates hostility; the social contract evolves to overcome the hostility.).

⁴⁰ See T. Hobbes, *supra* note 38, at 188; T. Hobbes, *supra* note 39, at 190, 234; see also Rosenfeld, *supra* note 3, at 864-65 (In a Hobbesian social contract, individuals voluntarily submit to the sovereign who assumes virtually absolute authority.).

⁴¹ See Rosenfeld, *supra* note 3, at 865.

⁴² As Benhabib points out, the initial position from which Hegel starts his journey in the *Philosophy of Right* presupposes the resolution of the struggle for recognition which Hegel analyzed in the *Phenomenology*. Benhabib, *supra* note 15, at 168. Further, according to Hegel, the self-consciousness that seeks recognition is desire. See *Phenomenology of Spirit*, *supra* note 17, para. 174.

⁴³ See *Phenomenology of Spirit*, *supra* note 17, paras. 797-808; see also *supra* notes 25 & 31.

seems suited to cement all necessary social and political relations without compromising the primacy of the individual, and sets that device in motion. Use of the device leads to the opposite of what it was supposed to, that is, to the dwarfing of the individual by her own self-imposed absolute monarchy. Hegel avoids this pitfall by projecting what the end result should be like to fully realize the aspirations of the abstract free willing subject encountered at the beginning of the *Philosophy of Right*.⁴⁴ Further, what remains to be done once the end result is given definition, is to fill the gap between point of departure and end result, by describing the process which leads from the former to the latter. Because the free will and the aspirations of the subject are *in themselves* the same as both ends of the process, what must be transformed through the unfolding of the process is the *for itself*. In other words, it is the perspective which the subject has toward its free will and aspirations, or to put it yet another way, the *meaning* which the free will and its aspirations have for the subject, that must be transformed until the subject becomes for-itself what it is in-itself.⁴⁵ Thus, the process of transformation is marked by a succession of perspectives, and from each of these perspectives the subject ascribes to its free will and aspirations a meaning which the subject hopes will be adequate for purposes of having such free will and aspirations fulfilled. But since the only adequate meaning is the one produced by the perspective from which the for-itself coincides with the in-itself, the meaning generated from any other perspective is bound to lead to some contradiction which only a shift in perspective can overcome.⁴⁶

The succession of perspectives that mark the road from point of departure to end result is not arbitrary. It is determined by the "inner necessity" or inner logic (one must remember that Hegel's is not a formal logic but rather a logic that is also an ontology, or as Hyppolite has put it, an "onto-logic")⁴⁷ of the concept of a free willing subject. Thus, each of the succeeding perspectives generated in the course of the journey from point of departure to end result is formed specifically to overcome the particular contradictions to which its immediate predecessor was inevitably led and which remained insoluble

⁴⁴ Strictly speaking, consistent with Hegel's claim that philosophy comes into the scene after the facts, see *supra* text accompanying note 28, both the initial position and end result should be available to the philosopher, whose task is principally concerned with retracing the path leading from the former to the latter.

⁴⁵ See *Phenomenology of Spirit*, *supra* note 17, paras. 25-26.

⁴⁶ See *id.* para. 29 (World Spirit must pass through every moment in world history, embodying in each moment "as much of its entire content as that [moment] was capable of holding.").

⁴⁷ J. Hyppolite, *supra* note 24, at 554.

from the standpoint of that predecessor. And each perspective embodies a partial truth, with the chain of succeeding perspectives representing the requisite sequence of partial truths that necessarily inform the full truth of the for-itself that corresponds to what it is in-itself.⁴⁸

The actual dialectic of the subject as presented by Hegel is often not only dense and difficult to follow in its minute details, but it also takes certain turns that appear to be rather arbitrary.⁴⁹ On the other hand, the "onto-logical" process underlying the entire historical progression of the subject towards absolute self-knowledge, and which repeats itself within each stage involved in that progression, is fairly clear and relatively easier to grasp.⁵⁰ In the most general terms, this process involves three distinct moments, and negation and contradiction necessitate passage from one to the next. In the first moment the subject establishes an immediate identity with itself. That identity, however, only establishes that the subject is other than the other, but it does nothing to link the subject to its manifold determinations. Being other than the other establishes mere identity but is wholly inadequate to bring about concrete individuality. Accordingly, the perspective of the first moment is dissolved and the subject passes into the second moment. From the perspective of the second moment, the subject can grasp the manifold diversity of its concrete determinations, but it fails to recognize that these are its own determinations. Thus, in the second moment the subject becomes aware of its diversity but can only do so by losing its identity. Finally, from the perspective of the third moment, which is established through the negation of the negation—that is, through the realization by the subject that the diversity which it perceived as being other is none other than itself—the subject regains its identity amidst its diversity.⁵¹ In the last analysis

⁴⁸ See supra note 31.

⁴⁹ For example, Hegel's use of the dialectical method in the context of the *Phenomenology* leads both to passages that are dense and obscure, see, e.g., J. Hyppolite, supra note 24, at 441, and to transitions that seem artificial, id. at 431.

⁵⁰ Hegel's dialectical method which underlies his logic, his ontology, and his phenomenology applies equally to his *Logic*, to his *Phenomenology*, and to his *Philosophy of Right* and integrates these three works, among others, as distinct aspects of his all-encompassing philosophic system. See J. Hyppolite, supra note 24, at 565 (There is a perfect correspondence between *Phenomenology* and the *Logic*. The same subject matter is analyzed in the former as an expression of consciousness and in the latter as a series of determinate concepts.); see also Pelczynski, Introduction, in *State and Civil Society*, supra note 15, at 6-7 (Dialectical method and basic categories of analysis developed in the *Logic* were later applied to the law, politics, and society in the *Philosophy of Right*.).

⁵¹ As Hegel states in the preface to the *Phenomenology*,

[The] . . . Substance . . . [or] Subject . . . is in truth actual only in so far as it is the movement of positing itself, or is the mediation of its self-othering with itself. This Substance is, as Subject, pure, *simple negativity*, and is for this very reason the bifurcation of the simple; it is the doubling which sets up opposition, and then

then, because of the very nature of Hegel's dialectical method, the first (immediate) attempt at grasping the meaning of a relation must fall short, and it is only by subsequently assuming the appearance of its opposite that the true meaning of that relation can be ultimately revealed.⁵²

Viewed within this methodological framework, Hegel's conception of contract assumes the following broad characteristics. The abstract person, who is the subject of the right to contract, is a partial portrait of the ethical, social, political, and historical person who enters into relations in the sociopolitical arena.⁵³ Actually, Hegel's abstract person is very much like Hobbes's individual found in the state of nature.⁵⁴ There is, however, an important difference between the two conceptions. Hegel calls his counterpart to the Hobbesian individual in the state of nature the "abstract person," indicating that this person is a construct who has been cut off from many of the diverse concrete determinations of the real historical person. Thus, whereas the free willing subject who is the protagonist of the *Philosophy of Right* may at first view herself as embodying the characteristics of the abstract person, Hegel is well aware that the abstract person provides only a partial representation of the subject of legal and political relations.⁵⁵ Hobbes, on the other hand, presents the abstract atomistic individual of his state of nature as the true representative of a universal and ahistorical conception of the human nature.⁵⁶ Thus, by failing to specify the limitations of his representation of the individual in the state of nature, Hobbes apparently compromises the entire course of his theoretical enterprise.

again the negation of this indifferent diversity and of its antithesis . . . Only this self-restoring sameness, or this reflection in otherness within itself—not an *original* or *immediate* unity as such—is the True.

Phenomenology of Spirit, supra note 17, para. 18 (emphasis in original). In a similar vein, Hegel further states that the Subject is "essence, or . . . *being in itself*; it is that which relates *itself to itself* and is *determinate*, it is *other-being* and *being-for-self*, and in this determinateness, or in its self-externality, abides within itself; in other words, it is *in and for itself*." Id. para. 25 (emphasis in original). See also 2 Logic, supra note 32, at 230 (same dialectical movement from self to otherness and back to self as it applies to the Notion).

⁵² See Phenomenology of Spirit, supra note 17, para. 17.

⁵³ As Benhabib emphasizes, the person who bears property and contract rights at the beginning of the *Philosophy of Right* represents a "conceptual abstraction." Benhabib, supra note 15, at 166. The *Philosophy of Right* itself, however, is launched from the standpoint of a community bound together by collective norms deriving from a process of intersubjective recognition. Id. at 168.

⁵⁴ See id. at 167.

⁵⁵ See, e.g., Hegel, *Philosophy of Right* para. 49R ("the person, as something abstract, has not yet been particularized or established as distinct in some specific way").

⁵⁶ For Hobbes, individuals are inherently independent from and equal to one another. See T. Hobbes, supra note 39, at 101, 114.

In contrast to the Hobbesian contract, which is the paramount legitimate vehicle for intersubjective relations, Hegelian contract plays a more modest role. Initially, both contractual vehicles are put into use by individuals who seek to satisfy the desires produced by their respective free wills.⁵⁷ By contract, the individual contractors jointly seek to promote their respective self-interests, and apparently place individual-regarding values ahead of community-regarding concerns.⁵⁸ Indeed, by establishing a set of correlative rights and obligations that run exclusively between the individual contractors, contract apparently separates the latter and their pursuit of self-interest from the remaining members of society.⁵⁹ If the contractual exchange takes place as planned, the contractors need not resort to any third party to enjoy the fruits of their bargain. Accordingly, from this vantage point, only when the contractual exchange does not take place as planned must contractors resort to the larger community, and enlist the help of a contract enforcer. Even in this latter case, however, individual-regarding concerns would still seem to predominate over community-regarding ones.⁶⁰

According to Hegel, a contract results from the arbitrary individual wills of the contractors, but it produces a common will of its own.⁶¹ Each contractor seeks to enlist the cooperation of the other in the pursuit of her own self-interest, but cannot obtain that cooperation without in turn making an agreement that helps to promote the other contractor's self-interest.⁶² It may be that by coincidence the common will embodied in the contract is but a mere aggregate of the individual wills seeking satisfaction through the contract. This would occur, for example, when each contractor could exchange an object for which she has no use for a coveted object in the possession of the

⁵⁷ Cf. *id.* at 111-12 (by nature, individuals seek society only to profit from it); *id.* at 146 (every man seeks what is good for himself); T. Hobbes, *supra* note 38, at 117 ("[t]he value of all things contracted for, is measured by the appetite of the contractors"); *Philosophy of Right*, *supra* note 18, para. 45R ("property is the first embodiment of freedom"); *id.* para. 65 (as object of the will of its individual owner, property can be alienated); *id.* para. 74 (contract originates in arbitrary will of the contractor and has as its object a single external thing).

⁵⁸ At least from the perspective of the individual contractors, contracts are most likely seen as a means to enhance self-interest. See *supra* note 57.

⁵⁹ See Rosenfeld, *supra* note 3, at 813-15.

⁶⁰ Indeed, the principal task of a contract enforcer is to enforce the contract according to its terms rather than to speculate whether enforcement or nonenforcement would produce a greater good for the community as a whole.

⁶¹ *Philosophy of Right*, *supra* note 18, para. 74.

⁶² As Hegel states, "The sphere of contract is made up of this mediation whereby I hold property not merely by means of a thing and my subjective will, but by means of another person's will as well and so hold it in virtue of my participation in a common will." *Id.* para. 71.

other contractor. In most cases, however, a contractor must give up something which is of value to her to obtain a more coveted object in exchange. Thus, although the individual contractor may obtain a particular object which she seeks through the contract, to the extent that the full satisfaction of arbitrary will would require the acquisition of all objects of desire, and to the extent that obtaining one object of desire through contract forecloses acquiring some other such objects, the common will generated through the contract no longer appears to be a mere aggregate of the individual wills of the contractors. Provided that the bargaining process preceding formation of the contract leads a contractor to agree to pay more for a coveted object than originally intended or to receive less than what was initially sought, the common will embodied in the contract would still, in part, satisfy the arbitrary wills of the contractors, but it would, in part, frustrate them.

The more the individual depends on the voluntary cooperation of others for the fulfillment of self-interest, the greater would seem the need for an ever larger number of self-imposed sacrifices in order to secure the satisfaction of individual desires. Taken to its logical extreme, in the context of a sociopolitical universe in which contract is the only legitimate vehicle for intersubjective relationships, the necessary cost in self-imposed sacrifices for the securing of individual desires is likely to become so prohibitive that individual freedom would risk turning into individual submission. This is the paradoxical fate of the Hobbesian state where freedom must be sacrificed to secure self-preservation.⁶³

There is yet another important way in which Hegelian contract leads to the opposite of what it first seems to establish from the limited standpoint of the abstract person. From the latter's perspective, the contractual relationship appears isolated and severed from the complex of legal and social relations from which it emerges.⁶⁴ From the more comprehensive perspective that seeks to embrace all contractual relationships, however, the focus of the overwhelming majority of voluntarily concluded contractual exchanges is the free market economy, which is the dominant institution in Hegel's civil society.⁶⁵ Following Adam Smith's claim that the clash between individuals engaged in the sole pursuit of self-interest is silently channeled by the "invisible hand" of competition towards the achievement of the com-

⁶³ See *supra* note 40 and accompanying text.

⁶⁴ From the standpoint of the individual contractor, the contract looms as the product of the confluence of two individual wills, and creates rights in the contractors which are in the first instance enforceable against each other and no one else.

⁶⁵ See Westphal, *supra* note 23, at 81-82.

mon good, Hegel believes that, taken as a whole, all contracts that are the product of arbitrary individual wills seeking to satisfy desire are led by the "cunning of reason" to form a network of social relationships governed by a series of common norms.⁶⁶ Thus, in contrast to the limited perspective of the abstract individual, from the broader perspective of civil society taken as a whole, contract emerges as a vehicle for collective undertakings governed by a set of commonly shared legal norms.⁶⁷ Once again, therefore, as the result of a shift in perspective, contract appears to turn into its opposite, from a vehicle that abstracts the individual from her social milieu to one that taps the individual's eager desire to satisfy self-interest and cunningly turns it into a source of collective cooperation.

Unlike Adam Smith, Hegel does not believe that unfettered competition in the economic marketplace is bound to produce the common good. Quite the contrary, Hegel is convinced that the free market necessarily experiences periodic crises of overproduction resulting in the exacerbation of disparities in wealth and in the creation of chronic poverty which poses a serious threat to the social order.⁶⁸ Because of this, Hegel cannot be satisfied with allowing contract to reign virtually free of all constraints over the economic sphere.

If pursuit of individual self-interest often does not lead to the common good, and if exclusive reliance on self-imposed obligations tends to turn freedom into submission, a reevaluation of the meaning of "free will" would be necessary. Indeed, if by free will we mean arbitrary will, it is ultimately self-contradictory since the uninhibited expression of the arbitrary will leads to the abdication of freedom. Accordingly, consistency requires that the exercise of free will must mean something other than the uninhibited pursuit of the endless se-

⁶⁶ See *Philosophy of Right*, supra note 18, para. 183:

In the course of the actual attainment of selfish ends—an attainment conditioned in this way by universality—there is formed a system of complete interdependence, wherein . . . one man is interwoven with the livelihood, happiness, and rights of all. On this system, individual happiness . . . depend, and only in this connected system are they actualized and secured.

See also *id.* para. 184TN ("Hegel's whole account of civil society . . . bears traces of his study of Adam Smith and the *laissez-faire* doctrine"); S. Avineri, *Hegel's Theory of the Modern State* 146-47 (1974) ("Hegel integrates the Smithian model of a free market into his philosophical system, by transforming Smith's 'hidden hand' into dialectical reason working in civil society, unbeknownst to its own members."); C. Taylor, supra note 16, at 433 (Hegel takes the "invisible hand" theory and makes it part of the "cunning of reason.").

⁶⁷ See Benhabib, supra note 15, at 162; *Philosophy of Right*, supra note 18, para. 213 ("Right becomes determinate in the first place when it has the form of being posited as positive law . . ."); *id.* paras. 217, 217A.

⁶⁸ *Philosophy of Right*, supra note 18, paras. 243-45; see R. Plant, supra note 31, at 169, 213-14.

ries of things that qualify as objects of desire. In other words, the will cannot be genuinely free if it is forced by a desire that it cannot control to aim ceaselessly from one object to another. To overcome this inconsistency, free will must find self-expression in a way such that it does not lose self-control.

Viewed in this light, the concept of free will should be understood as depending on self-control rather than on mere desire or impulse. Moreover, for Hegel, the person demonstrates self-control by freely willing to perform her duty.⁶⁹ Although this may seem paradoxical at first, Hegel maintains that the freedom to follow one's impulses is but abstract freedom whereas freely willing one's duty is substantive or positive freedom.⁷⁰ From the perspective of this latter freedom, one is only genuinely free through conscious assumption of one's duty, which not only evinces the achievement of self-control, but also provides the means to overcome the deficiencies of a collective order propelled exclusively by the pursuit of self-interest.

Although self-imposed, the duty that corresponds to positive freedom differs sharply from contractual duties in that it is not dependent on a correlative right or assumed in a trade-off for a particular object of desire.⁷¹ Instead, this duty is a universal moral duty, which in its initial appearances is an expression of *Moralität*—that is, a Kantian duty-based morality that prescribes that all actions should conform to universal maxims.⁷² According to Hegel, however, Kantian morality is ultimately without content, and must therefore be transcended.⁷³ Indeed, *Moralität* stands in opposition to the self-interest of the marketplace,⁷⁴ but while it prescribes action in accordance with universal principle, it does nothing to specify the *content* of moral action.⁷⁵

To provide a determinate content to the duty that springs from the true essence of free will, Hegel proposes a transition from *Moralität* to *Sittlichkeit*.⁷⁶ Inherent in the concept of *Sittlichkeit* is the notion of community as defined through the amalgam of customs and norms which have been internalized by a people and which have given

⁶⁹ Philosophy of Right, *supra* note 18, paras. 149, 149A.

⁷⁰ *Id.*

⁷¹ For an extended discussion of Hegel's conception of the relation between right and duty, see Jacobson, Hegel's Legal Plenum, 10 Cardozo L. Rev. 877 (1989).

⁷² See Philosophy of Right, *supra* note 18, paras. 33, 33A, 34TN, 141, 141A.

⁷³ *Id.* paras. 135, 135A.

⁷⁴ The proper place of *Moralität* is in the context of civil society. See *id.* para. 207. Moreover, abstract reflection envisions morality as a constant struggle against self-satisfaction. *Id.* para. 124.

⁷⁵ See *id.* paras. 135, 135A.

⁷⁶ *Id.* paras. 141, 141A.

shape to its collective identity.⁷⁷ Moreover, while each people has its own *Sittlichkeit*, Hegel specifies that there is a crucial difference between the *Sittlichkeit* of modern peoples and that of the ancients.⁷⁸ Greek ethical life lacked concern for subjective freedom.⁷⁹ Modern ethical life, in contrast, involves not only the internalization of common norms, but also the conscious and deliberate adoption of these norms as the determinate objectifications of the self-imposed duty through which the moral subject realizes the true essence of its free will.⁸⁰ In other words, modern ethical life consists not only in living together with others in accordance with shared communal norms, but also in freely choosing these norms to govern the life of the community. Thus, in one sense these communal norms are *not* chosen: they are the given norms of the community which are transmitted from one generation to the next and which every member of society finds reflected in the collective institutions in which she partakes.⁸¹ In another sense, however, these communal norms *are* chosen: that is, to the extent that the subject freely decides to make it her duty to abide by them and to act only in accordance with their prescriptions.⁸²

Sittlichkeit can only be fully realized in the context of the Hegelian state.⁸³ Logically, in accordance with Hegel's dialectical method, the state is necessary to resolve the contradictions that flow from the operation of civil society.⁸⁴ Specifically, as the political organ of the community, the state must intervene in the marketplace to combat the great disparity in wealth and the chronic poverty that

⁷⁷ See C. Taylor, *supra* note 16, at 376, 444; *Philosophy of Right*, *supra* note 18, paras. 151-56.

⁷⁸ See Walton, Hegel: Individual Agency and Social Context, in Hegel's *Philosophy of Action* 75, 88-89 (L. Stepelevich & D. Lamb eds. 1983).

⁷⁹ See Pelczynski, *Political Community and Individual Freedom in Hegel's Philosophy of State*, in *State and Civil Society*, *supra* note 15, at 55, 57 (According to Hegel, the fundamental presupposition of ancient Greek political life was the "absolute priority of the community over the individual."); *Philosophy of Right*, *supra* note 18, para. 260A.

⁸⁰ See *Philosophy of Right*, *supra* note 18, paras. 260, 260A; see also Pelczynski, *supra* note 79, at 68:

In terms of European culture *Sittlichkeit* is the ethical existence of the modern European man when he has become aware of his individuality, asserted its rights in theory and in practice, and at the same time has accepted the necessity of an objectively existing ethical order in which his individuality is realized.

⁸¹ See *Philosophy of Right*, *supra* note 18, para. 151; Pelczynski, *supra* note 79, at 68 ("duties are the content of laws, institutions, organizations and communities which together make up the structure of an ethical community").

⁸² See *Philosophy of Right*, *supra* note 18, para. 151A (in the context of ethical life, "the will is mind's will and it has a content which is substantive and in conformity with itself"); *id.* para. 151TN (In Hegel's view, "the highest type of ethical life is that in which individuals *conscientiously* conform to *rational* institutions and customs.") (emphasis in original).

⁸³ See *id.* para. 258R (only as a member of the state can the individual have an ethical life).

⁸⁴ See *id.* paras. 261, 261A, 263A.

Hegel believes are inevitably created as a by-product of civil society.⁸⁵ From the standpoint of the subject, on the other hand, the state represents a new perspective, based on community norms, that contrasts with the individual-regarding and self-interested perspective that prevails in civil society.⁸⁶

Given the logical role of the state within Hegel's dialectic vision, it becomes apparent why Hegel rejects the social contract as the source of legitimacy for the state. Indeed, the state appears necessary and fully justified from a perspective which is constituted precisely to transcend the inherent contradictions of contractarianism.⁸⁷ And Hegel's systematic analysis leads to a radically different result than Hobbes's, notwithstanding the similarities of their points of departure. For Hobbes, who proceeds from a single perspective, the state looms as the product of yet another contract in a sociopolitical universe in which all peaceful relationships loom as contractual in nature.⁸⁸ On the other hand, for Hegel, whose holistic methodology leads to the succession of a multiplicity of perspectives, the state's logical place is in an important sense to stand in opposition to contract.⁸⁹ That is, by drawing on the reservoir of community norms, the state opposes the conflicting and socially disruptive contractual outcomes that are the products of the confluence of arbitrary wills.⁹⁰

Although the Hegelian state is not *contractual* in nature, that does not mean that it is not ultimately *consensual*. The Hegelian state cannot be viewed as the product of a trade-off whereby certain rights are secured through the voluntary assumption of certain duties. The subject is nevertheless free to choose, as its self-imposed duty, to abide by the dictates of the communal norms that inform the sociomoral and sociopolitical reality of the state. And this is precisely what

⁸⁵ See R. Plant, *supra* note 31, at 169-71, 213-16.

⁸⁶ See *Philosophy of Right*, *supra* note 18, paras. 260-61.

⁸⁷ Contractarianism in its "pure" form requires that all legitimate intersubjective relationships are ultimately contractual in nature. See Rosenfeld, *supra* note 3, at 790-98, 858-60. Hegel, however, rejects that position. As Benhabib puts it: "The act of contract cannot generate the conditions of its own validity but presupposes background norms and rules the compliance with which confers validity on the contractual transaction. . . . [V]alid contractual transactions presuppose the non-contracted and non-contractual capacity of individuals to be treated as being entitled to rights." Benhabib, *supra* note 15, at 162.

⁸⁸ See Rosenfeld, *supra* note 3, at 859 (for Hobbes "the social contract's essential function is to form an agreement among a group of individuals to abide by the terms of their private agreements").

⁸⁹ See *Philosophy of Right*, *supra* note 18, paras. 75, 75A (contract rests on arbitrary will; the state rests on reason).

⁹⁰ See *id.* para. 260 (in the state, "personal individuality and its particular interests . . . pass over of their own accord into the interest of the universal, and . . . they know and will the universal").

Hegel believes that the subject would do upon adopting the ethical perspective of the modern state.⁹¹

Thus we apparently come to the end of the dialectical process that progressively reveals the full meaning which contract has for Hegel, through a series of reversals and qualifications prompted by the inner logic that requires the above-mentioned shifts in perspective. This Article thus far has only touched on the broad outlines of the Hegelian conception of contract, leaving for later the task of providing a more detailed analysis. Nevertheless, some important points have already emerged: contract is the product of arbitrary will seeking self-interest, and is thus individual-regarding from the standpoint of the contractors. Through the "cunning of reason," however, civil society as the sphere of all contracts is led to adopt a set of collective legal norms necessary to secure the enforcement of contracts. Accordingly, the pursuit of individualist aims necessarily leads to the establishment of a minimum of community-wide norms. In addition, to the extent that the contractual exchanges that take place within the confines of civil society tend to promote the common good, individual-regarding interests appear to coincide with community-regarding goals. To the extent that contractual exchanges are also bound to lead to substantial social disruption, however, the individual-regarding aims of contract must be checked and opposed by the community-based goals of the noncontractual state.

Hegel's dialectical methodology avoids the pitfalls of individualism, but this arguably may only be at the cost of falling into those of collectivism. As the culminating stage in the dialectic of Objective Spirit, the Hegelian state, which embodies the perspective of a society taken as a whole, may seem bound to impose collective norms and values in its pursuit of the goals of the community. Interpreted as authoritarian in nature, the Hegelian state may be seen as instituting and propagating a collective vision of the whole without allowing sufficient room for the development of individual-regarding aims and aspirations. Regarding contract, the authoritarian state may prohibit contractual relationships, interfere with them, or restrict their use to the point of rendering them virtually insignificant. Indeed, in the context of a traditional paradigm, such as that envisioned by Hobbes, not only is contract almost all-encompassing, but in an overwhelming majority of the cases the validity of a contract depends on the *fact* that it is a contract rather than on the *content* of the actual terms of agreement which it contains.⁹² From the perspective of the Hegelian state,

⁹¹ See *id.* paras. 260, 260A.

⁹² This follows from Hobbes's postulation that it is the contractors' appetite which pro-

on the other hand, collective intervention in the sphere of individual contractual relationships is warranted whenever contracts would lead to outcomes that would be contrary to community interests.⁹³ Accordingly, to the extent that the Hegelian state justifies the application of substantive community norms to private market transactions, the validity of contracts between individual market participants depends more on the *content* of that contract than on the fact that it was voluntarily entered into. Thus, moving from the perspective of the abstract person to that of the state, the validity of contracts depends less on the fact that contractual obligations are self-imposed than on whether such obligations can be justified in terms of substantive community norms. And taken to its logical extreme, it would seem that wholesale importation of substantive community norms into the sphere of private market transactions eventually would lead not only to collective determination of the terms of agreements but also to collective decisions concerning *who* can contract, *when* she can contract, and *what* constitutes an appropriate subject matter for contractual exchange. Under these circumstances, the individual-regarding aspects of contract would become almost completely subordinate to its community-regarding ones.⁹⁴

Thus, Hegel's dialectic appears to surmount the shortcomings of methodological individualism only to succumb to those of methodological collectivism. This characterization is defective, however, as it rests on an interpretation of the Hegelian state that abstracts the product from the process, the whole from its constituent parts. Indeed, Hegel's methodological approach does not merely imply that the whole be interpreted in terms of its relation to its parts. Hegel's "onto-logic" requires that the particular institutions and relationships that become meaningful in the context of a partial perspective do not simply disappear when that perspective is transcended. The passage from one perspective to the next does not eliminate the constituent elements of the first perspective; it merely recombines them to make them intelligible from the later perspective. Moreover, the process whereby the elements of one perspective are simultaneously canceled

vides justification to the actual terms of contractual exchanges. See T. Hobbes, *supra* note 38, at 117.

⁹³ See R. Plant, *supra* note 31, at 216 ("the economic market produces unacceptable outcomes both for particular individuals and also for society as a whole and it has to be constrained by the state").

⁹⁴ According to Plant, Hegel was "keenly aware that in imposing some sort of order on the system of needs the state is likely to appear to be authoritarian in its actions and its policies are likely to appear as external impositions." *Id.* at 216.

and preserved in the course of the transition to the next perspective is what Hegel refers to as the process of "*Aufhebung*." As Hegel puts it,

What transcends (*Aufheben*) itself does not thereby become [n]othing. . . . It . . . retains the determinateness whence it started. To transcend (*Aufheben*) has this double meaning, that it signifies to keep or to preserve and also to make to cease, to finish. . . . Thus, what is transcended is also preserved; it has only lost its immediacy and is not on that account annihilated.⁹⁵

As interpreted in light of the concept of *Aufhebung*, the advent of the Hegelian state need not signify the demise of the contractual relationships prevalent in civil society. Instead, from the state's perspective, the scope of valid contractual relationships needs only to be somewhat narrowed to avert the adverse collective consequences likely to flow from a regime of virtually unchecked contractual relationships.⁹⁶ Under this new perspective, contracts are no longer justified merely because they are contracts, but also because they promote the common good. Moreover, while the extent to which contracts promote the common good may be an open question, if contractual relationships contribute to the common good they are arguably preferable to other means equally well suited to lead to the same result, because of the role which they may play in furthering the development of the person's individuality.⁹⁷ Accordingly, it is reasonable to insist that in the modern state, freedom of contract within certain well-defined limits should be adopted as one of the community norms contributing to the definition of the ethical substance of the state.

Finally, in the context of Hegel's dialectic, the full meaning of a concept emerges out of the combination of both the tracing of the process that goes from initial position to end result and the retracing of the various steps involved in that process in the opposite direction, from end result towards the initial position.⁹⁸ Thus, for example, when perceived from the standpoint of the abstract person, contract is the individual-regarding product of arbitrary will, but when viewed from the perspective of the state, it is a social practice depending on the existence of certain shared community norms, such as rules of contract formation, canons of contract interpretation, and precepts of

⁹⁵ 2 Logic, supra note 32, at 119-20.

⁹⁶ Cf. R. Plant, supra note 31, at 224 ("Hegel's state transcends the egoism of the market place but at the same time is not to be seen as an alien institution imposed upon the market.").

⁹⁷ Hegel makes it clear that the modern state is designed to preserve the individuality of its members. See Philosophy of Right, supra note 18, paras. 261, 261R, 261A. Hegel states: "Particular interests should . . . not be set aside or completely suppressed; instead, they should be put in correspondence with the universal, and thereby both they and the universal are upheld." Id. para. 261R.

⁹⁸ See supra text accompanying notes 26-35.

contract enforcement. The perspective of the Hegelian state is not only noncontractual in nature but it actually opposes the perspective from which all valid intersubjective relationships tend to be contractual in nature. Within the perspective of civil society, the totality of contractual relationships are harmonized by some underlying common norms, but the latter might well seem to be the spontaneous product of the "invisible hand" of competition.⁹⁹ Viewed from the more encompassing perspective of the state, however, these norms, which take the form of legal rules and standards, are ultimately dependent on the coercive powers of the state.¹⁰⁰ Indeed, contracts are not self-enforcing, and, without enforcement, contractual relationships might disintegrate as contractors would lack the incentive to carry out their contractual obligations after having received the benefits to which they are entitled under the contract.¹⁰¹ In addition, because contract formation rules are not self-defining and contract interpretation standards are not self-evident,¹⁰² contractual relationships ultimately depend on the state and its underlying network of community norms for their definition, interpretation, and support. Hence, not only is the Hegelian state noncontractual and, in a sense, constituted in opposition to contract, but it also plays an essential role in the definition and maintenance of contract.

Hegel avoids the inconsistencies of Hobbesian individualistic contractarianism by conceiving contractual relationships as dependent on noncontractual ones. Moreover, in the context of Hegel's dialectical method, it is not, strictly speaking, contract that maintains an equilibrium between individual-regarding and community-regarding values. Instead, such an equilibrium results from the opposition between individual and collective forces, animating the process of mutual definition that inextricably links contract to noncontract.¹⁰³ To obtain a better grasp on that process, it is necessary to consider Hegel's conception of contract in greater detail.

⁹⁹ See *supra* note 66.

¹⁰⁰ Cf. *Philosophy of Right*, *supra* note 18, para. 261: "In contrast with the spheres of private rights and private welfare (the family and civil society), the state is from one point of view an external necessity and their higher authority; its nature is such that their laws and interests are subordinate to it and dependent on it."

¹⁰¹ Cf. T. Hobbes, *supra* note 38, at 108 (in the state of nature there is no incentive to perform one's contractual obligations after receipt of the benefits sought in the contractual agreement).

¹⁰² See Rosenfeld, *supra* note 3, at 840-45.

¹⁰³ See *infra* text accompanying notes 262-67.

II. THE MEANING OF CONTRACT FOR HEGEL

The *Philosophy of Right* traces the dialectical journey that leads from the perspective of the abstract person to that of the modern state. The abstract person who is the bearer of the abstract rights of property and contract, while (for-itself) severed from the many attributes of full personhood, is nevertheless not cut off from other persons. Indeed, property and contract cannot be meaningful except in the context of intersubjective relationships based on reciprocal recognition.¹⁰⁴ Without such recognition property would dissolve into mere possession, and the formation of contract to embody the common will of its contractors simply would be unthinkable. Accordingly, even the initial perspective presented by Hegel in the *Philosophy of Right* posits a sociopolitical universe in which the right to reciprocal recognition is already an accepted given.¹⁰⁵ Because this right plays such a crucial role in the context of contract, it is important to elucidate it by briefly retracing the process of its formation. Thus, we are led back to the struggle for recognition and to the celebrated dialectic between lord and bondsman which Hegel addresses in the *Phenomenology*.¹⁰⁶

The struggle for recognition is part of the dialectic of self-consciousness. Self-consciousness for Hegel is desire.¹⁰⁷ In the first instance, desire seeks objects to appropriate and consume them.¹⁰⁸ Moreover, such appropriation and consumption are acts of negation through which self-consciousness seeks to establish its own identity.¹⁰⁹ By appropriating and consuming an object, self-consciousness negates the independence of that object, and simultaneously develops a perception of itself as that which is independent of its objects by focusing on the contrast between itself and the object it negates—that is, by grasping itself as that which does not lose its independence in the course of the process of appropriation and consumption.¹¹⁰ Similarly, in contrast to its appropriated and consumed object which loses its identity, self-consciousness retains its identity as that which negates its objects.¹¹¹

¹⁰⁴ See *Philosophy of Right*, supra note 18, para. 51A (property right entails recognition by others); id. para. 71R ("Contract presupposes that the parties entering it recognize each other as persons and property owners.").

¹⁰⁵ See Benhabib, supra note 15, at 168 ("The *Philosophy of Right* . . . begins from the standpoint of a social totality in which the right of individuals to be recognized as persons has become established as an intersubjective practice.").

¹⁰⁶ *Phenomenology of Spirit*, supra note 17, paras. 178-96.

¹⁰⁷ Id. para. 167.

¹⁰⁸ See id. para. 174.

¹⁰⁹ Id. para. 175.

¹¹⁰ Id.

¹¹¹ Id.

To the extent that the negation of the appropriated objects is what allows self-consciousness to maintain its identity, the desire for objects becomes insatiable as each consumed object must be replaced by another object of desire.¹¹² Indeed, once it is understood that the aim of desire is the preservation of self-consciousness, then it seems logical to conclude, as Hegel does, that self-consciousness can only achieve satisfaction in another self-consciousness.¹¹³ If desire seeks to maintain identity, then self-consciousness must seek an object which provides it with recognition. And the only object which can provide sustained recognition to a self-consciousness is another self-consciousness.¹¹⁴

Self-consciousness' desire for recognition can only be satisfied by another self-consciousness, through mutual recognition.¹¹⁵ Moreover, an optimal way to bring about genuine mutual recognition is through love.¹¹⁶ Indeed, in love each self-consciousness recognizes the other without attempting to reduce it to being a mere reflection of itself. In other words, in love both self-consciousnesses are united in mutual recognition, but each is able to preserve its individuality and freedom in the course of its union with the other.¹¹⁷

If all self-consciousness could be united through love, individuality and community would not only be mutually compatible but also mutually reinforcing, and no room for contractual relationships would remain. Hegel, however, does not believe that in a large society all social relationships can be founded on love.¹¹⁸ Actually, even at the level of abstraction of the phenomenology of self-consciousness, Hegel invokes the metaphor of the struggle between lord and bondsman rather than that of love in order to introduce his account of the process that leads to mutual recognition.¹¹⁹

Hegel's metaphor of the struggle for recognition is in some way reminiscent of Hobbes's vision of the precontractual struggle for possessions in the state of nature. In some sense, both are struggles for recognition, and both concern parties who seek to obtain recognition from others without having to reciprocate. In the Hobbesian state of nature, the individual seeks to satisfy her desire to obtain possessions, but is frustrated by others who seek to possess the same objects and

¹¹² Id.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ See J. Hyppolite, *supra* note 24, at 157.

¹¹⁶ Id. at 158.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.

who refuse to recognize anyone else's claims to them. Further, this lack of recognition can literally lead to death, as completely unconstrained competition among equals for scarce objects of desire produces a state of war in which the individual is ready to kill anyone who may stand in the way of her acquisition of a coveted object.¹²⁰ Because the Hobbesian individual cannot obtain recognition without reciprocating, and because such lack of recognition means a constant risk of violent death, she agrees to enter into the social contract. By this contract, the individual contractors reciprocally recognize their respective rights of self-preservation, reciprocally renounce their violent ways, and mutually covenant to submit to the authority of the sovereign.¹²¹ On the other hand, in contrast to the Hobbesian struggle for recognition relating to possessions, the Hegelian struggle is for the attention of the other self-consciousness.¹²² Also, whereas the Hobbesian struggle leads to death or contract, its more complex Hegelian counterpart results in a dialectic between subordination and reciprocal recognition.

The two archetypical figures of the lord and the bondsman in the *Phenomenology* are not the product of history or of class divisions, but rather the respective embodiments of the opposing attitudes involved in the course of the struggle for recognition.¹²³ Self-consciousness seeks to satisfy its desire for recognition through another self-consciousness devoted to recognizing and acknowledging its (the first self-consciousness') individuality. That leads to a struggle, however, inasmuch as each self-consciousness would rather be a recognized self-consciousness than a recognizing one.¹²⁴ Indeed, being a recognizing self-consciousness is problematical, as it involves becoming a reflection of the self-consciousness it recognizes, and thus, to that extent, losing one's own identity.¹²⁵ Under those conditions, the struggle for recognition becomes a struggle for the freedom of the recognized self-consciousness—a freedom which, to the extent that it requires the subordination of another self-consciousness, cannot be obtained without risking one's life.¹²⁶ It is precisely at this point that a choice must be made between two possible attitudes: that of the lord and that of the bondsman. The lord is willing to risk his life to secure

¹²⁰ See T. Hobbes, *supra* note 38, at 63-66; T. Hobbes, *supra* note 39, at 101, 114-15, 117.

¹²¹ See T. Hobbes, *supra* note 39, at 190.

¹²² See J. Hyppolite, *supra* note 24, at 158, 164.

¹²³ See *Phenomenology of Spirit*, *supra* note 17, paras. 178-96.

¹²⁴ *Id.* paras. 185-87.

¹²⁵ See *id.* para. 189 (the essence of the recognizing self-consciousness is "simply to live or to be for another").

¹²⁶ *Id.* para. 187.

his freedom.¹²⁷ The bondsman, on the other hand, is primarily motivated by the fear of death, and therefore opts for survival, even though that entails the loss of freedom.¹²⁸

Whereas the struggle in the Hobbesian state of nature is among equals, the struggle between lord and bondsman begins as a relationship among unequals. The lord, as the recognized self-consciousness who has overcome the fear of death, imposes his will on the bondsman who, as the recognizing self-consciousness, abdicates his freedom to avert death. Moreover, the subordination of the bondsman to the lord's will finds concrete expression in the work that the bondsman must perform for the lord.¹²⁹ The bondsman must labor to produce goods for the pleasures of the lord, and these goods, which must conform to the specification of the lord, become the tangible embodiment of the unequal relationship between them. Indeed, from the lord's standpoint, the goods produced by the bondsman are not only objects for the lord's pleasures but also reflections of his power to compel the bondsman to devote himself to giving concrete content to the expressions of the lord's free will. Conversely, from the bondsman's standpoint, production of goods for the lord signifies self-estrangement and apparent resignation to the role of a subordinate who exists to further the will of the lord by suppressing the dictates of his own will and becoming the vehicle for the concrete expression of his lord's will.¹³⁰

Because of the fundamental inequality between lord and bondsman, and because the lord views the bondsman as a mere instrument who exists to satisfy the lord's desires, the relationship between lord and bondsman cannot be viewed as contractual in nature, nor as a direct prelude to contractual exchange. Thus, at least in its initial appearance, the relationship between lord and bondsman is much farther removed from contract than that between the warring individuals found in the Hobbesian state of nature. On the other hand, the relationship between lord and bondsman is for Hegel the first in a series of "onto-logical" steps that lead to contract. Contrary to Hobbes, however, Hegel roots the process that leads to contract in inequality rather than equality. This is significant for determining which relationships should be viewed as contractual in nature.¹³¹

Upon further consideration, the initial impression conveyed by the relationship between the lord and the bondsman turns out to be

¹²⁷ See J. Hyppolite, *supra* note 24, at 165.

¹²⁸ *Id.*

¹²⁹ See *Phenomenology of Spirit*, *supra* note 17, para. 190.

¹³⁰ *Id.*

¹³¹ See *infra* text accompanying notes 247-52.

misleading. Whereas the lord initially appears to be free, he in fact depends on the bondsman for the satisfaction of his desire, and to that extent his freedom turns out to be illusory.¹³² Similarly, in the course of performing his work, the bondsman realizes that he is in fact the opposite of what he originally thought he was. First, he realizes that his subordination is ultimately self-imposed and that it was precipitated by his fear of death. According to Hegel, work relieves the dread associated with the fear of death and thus opens the bondsman's eyes concerning the true reason for his submission.¹³³ Second, work and the products of work lead the bondsman to become aware of the extent of his genuine independence from the lord and the latter's actual dependence on him.¹³⁴ Thus, besides freeing him from the fear of death, work forces the bondsman to hold his desire in check, enhancing his self-control.¹³⁵ Moreover, although the goods produced by the bondsman may conform to the specification of the lord, as products, they nevertheless stand on their own as independent from the lord. And on contemplating the independence of his product, Hegel maintains, the bondsman discovers his own independence from the lord, and the latter's ultimate dependence on him for the satisfaction of the desire.¹³⁶ Therefore, the attempt by self-consciousness to obtain recognition from another self-consciousness without having to reciprocate is led by the inexorable movement of Hegel's dialectic to a dramatic failure. The lord seeks to become a master and to make the bondsman a slave, but in the end, to put it in Hyppolite's terms, the slave becomes the master of the master while the master becomes the slave of the slave.¹³⁷

As Hegel elaborates in the *Phenomenology*, the struggle leading to reciprocal recognition is presented as taking place at a high level of abstraction, at which self-consciousnesses vie for recognition in a rarified universe devoid of particular social or political attributes.¹³⁸ The social consequences of this struggle, on the other hand, are supposed to become manifest in the context of the legal universe in which individuals relate to each other as persons endowed with certain rights.¹³⁹ That universe, as already mentioned, is the subject of the *Philosophy*

¹³² See *Phenomenology of Spirit*, supra note 17, para. 194.

¹³³ *Id.*

¹³⁴ *Id.* para. 196.

¹³⁵ *Id.* para. 195.

¹³⁶ *Id.* para. 196.

¹³⁷ J. Hyppolite, supra note 24, at 166.

¹³⁸ See *id.* at 38 (Hegel's *Phenomenology* is not a history of the world); *id.* at 151 (the struggle between lord and bondsman takes place within self-consciousness and its resolution leads to the self-mastery of stoicism) (author's translation).

¹³⁹ The initial position in the *Philosophy of Right* presupposes, as Benhabib points out, the

of Right, and its initial stage is that of the abstract person endowed with abstract rights, including the right to contract.

As initially stated, the universe of the abstract person and of contract rights presupposes reciprocal recognition, and is thus logically posterior to the struggle for recognition.¹⁴⁰ Contract itself also can be viewed as the culmination of the process set in motion by the struggle for recognition, and as accordingly rooted in inequality. Further, the struggle for recognition can serve as a metaphor for the process of contract formation, once it is understood that the primary purpose of contract in Hegel's system is to give determinate content to the reciprocal recognition rather than merely to facilitate the acquisition of coveted goods.¹⁴¹

To better understand the conceptual link between the struggle for recognition and contract formation, and to better appreciate the implications of rooting contract in inequality, it is instructive once again to contrast the Hegelian approach to the Hobbesian one. For Hobbes, as already mentioned, equality prevails in the state of nature. The social contract is an agreement among equals, and legal contracts between members of organized society are also viewed as relationships between equals.¹⁴² Hobbes presupposes equality among individuals as a fundamental given, which endures throughout all phases of the progression, from the state of nature to the free market economy, supposedly prevailing in the fully constituted state.¹⁴³

The equality that exists in Hobbes's state of nature appears on first impression to be substantive, whereas that which prevails after consummation of the social contract seems to be purely formal. Individuals in the state of nature are equal in two essential respects: they are all equal before death and for all relevant purposes, equal in strength, in that any of them can kill any other.¹⁴⁴ By contrast, individuals in the economic marketplace need not be equals in strength,

resolution of the struggle for recognition addressed by Hegel in the *Phenomenology*. See Benhabib, *supra* note 15, at 168.

¹⁴⁰ See *supra* note 105 and accompanying text.

¹⁴¹ Cf. *Philosophy of Right*, *supra* note 18, para. 40 (Initially, "it is only as owners that . . . two persons really exist for each other. Their implicit identity is realized through the transference of property from one to the other in conformity with a common will and without detriment to the rights of either. This is *contract*." (emphasis in original)).

¹⁴² See *supra* notes 120-21 and accompanying text.

¹⁴³ The one glaring exception to this concerns the relationship between individual members of society and their sovereign. This is because, in the context of Hobbes's conception of the social contract, the contract of government, unlike the contract of association, is ultimately a contract of submission. See T. Hobbes, *supra* note 38, at 189; T. Hobbes, *supra* note 39, at 190.

¹⁴⁴ See T. Hobbes, *supra* note 38, at 98; T. Hobbes, *supra* note 39, at 113-14.

possession, or wealth, provided that they remain equal in their capacity to enter into contractual relationships.¹⁴⁵ Thus, given an initial position of apparent substantive equality, all subsequent intersubjective relationships are automatically legitimate provided that they only include self-imposed obligations and that they do not abridge any individual's equal right to enter into contracts. In other words, in absence of coercion—and for Hobbes, coercion occurs only when one of the would be contractors is left literally with no other alternative but to enter into the contract¹⁴⁶—all contracts that do not impair freedom to contract are legitimate.

Under these circumstances, substantial inequalities between contractors leading to large disparities in their power to obtain advantageous contractual terms do not invalidate their agreements. For example, the fact that one contractor would face starvation unless she entered an employment contract at a bare subsistence wage would not invalidate such contract. Provided that she is not forced into the employment relationship without her prior consent, she should be bound by the terms of her contract because both the employer and the employee are ultimately rooted in an initial position of substantive equality, and every subsequent position which they have come to occupy, including their present mutually dependent one, came about as the consequence of a series of fully consensual acts and transactions on each of their respective parts.

The Hobbesian model for the justification of contractual relationships is nevertheless purely formal, even if one accepts as legitimate any transaction based on a series of purely consensual moves and ultimately traceable to an initial position of substantive equality. The state of nature is itself an abstract construct that posits an intersubjective universe from which all concrete social and political institutions have been removed.¹⁴⁷ The equality of Hobbes's state of nature amounts to little more than a denial that different individuals are inherently—that is, ontologically—unequal, or, in other words, to a postulation of formal equality. In the last analysis, therefore, the Hobbesian justification of contract appears to be circular. Provided that individuals are formally equal in the sense of having an equal right to enter into contracts, and provided that all contractual obligations are consensual in form and that they do not impair the freedom

¹⁴⁵ Cf. T. Hobbes, *supra* note 39, at 140 (since all individuals are equal by nature, no one should arrogate to himself more rights than another unless such right is obtained by means of a contract).

¹⁴⁶ Cf. T. Hobbes, *supra* note 38, at 110 (covenants exacted by fear are legitimate); T. Hobbes, *supra* note 39, at 130 (promises made out of fear are enforceable).

¹⁴⁷ See Rosenfeld, *supra* note 3, at 852.

to contract, contracts are valid and should be enforced. This justification thus begs the key questions of substantive freedom and substantive equality.

By rooting contract in inequality, Hegel avoids the circularity that afflicts Hobbes's account. Although the struggle between lord and bondsman is purely metaphoric in nature, the initial relationship between the two bears a much closer resemblance to the historical circumstances that gave rise to the era of modern purposive contract than does the Hobbesian state of nature.¹⁴⁸ Moreover, although contract is possible only if the formal freedom and formal equality that emerge from Hobbes's account are present,¹⁴⁹ the more important inquiry relating to the scope of legitimacy of contract concerns the possibility of justifying contractual relationships in the face of initial conditions of substantive inequality. By starting from such inequality, and by implicitly indicating that neither formal equality nor formal consent is sufficient to produce a valid contract, Hegel definitely seems to be on the right track. The question that Hegel's own analysis raises, however, is whether the concept of reciprocal recognition upon which he relies to justify contractual relationships ultimately provides a more satisfactory foundation for contract than does Hobbes. To be able to answer that question, it is first necessary to take a closer look at the conceptual similarities between the process of contract formation and the struggle for recognition between lord and bondsman.

Under conditions of freedom to contract, the process of contract formation between two individuals can be schematized as follows: each individual seeks to deal with the other because she believes that she cannot obtain the good she seeks (or that she can only obtain it at a much greater cost) without enlisting the cooperation of the other. One individual cannot force the other to cooperate because of the application of the principles of formal equality and freedom to contract. As each seeks to obtain the greatest possible benefit at the least possible cost, the two individuals are likely to bargain over the terms of their proposed contractual relationship. Since neither individual is likely to confer a benefit on the other without receiving anything in exchange, if their bargaining leads to an agreement it will be on terms

¹⁴⁸ While the *Phenomenology* is not a history of the world, see *supra* note 138, for Hegel ontology recapitulates phylogeny, see *supra* note 29 and accompanying text.

¹⁴⁹ Formal freedom and equality represent the minimum necessary for contractual relationships to be meaningful, but they are not necessarily sufficient for contracts to be legitimate. Moreover, in Hegel's case the presence of purely formal conditions cannot alone provide legitimacy to contract as the validity of contract ultimately depends on adherence to certain substantive noncontractual norms. See *supra* note 87.

which would be less advantageous for each individual than what she had hoped for initially.¹⁵⁰ Assuming each individual is exclusively motivated by self-interest while committed to respect the constraints imposed by formal equality and freedom to contract, bargaining should only lead to an agreement under the following circumstances: a meeting of the minds is reached on contractual terms such that neither party obtains as good a deal as originally hoped for, but each party obtains a better deal than she would have otherwise—that is, by not contracting or by contracting with another party.¹⁵¹

In the struggle for recognition, each self-consciousness similarly seeks to obtain the greatest possible recognition while granting its counterpart the least possible recognition.¹⁵² Unlike in the process of contract formation, however, in the struggle for recognition the initial position is one of inequality between the two prototypical figures of lord and bondsman.¹⁵³ Also, whereas in contract formation the moment of consent is crucial as it transforms the product of precontractual dealings into a mutually binding agreement, in the struggle for recognition consent plays a much less prominent role. Indeed, the bondsman, prompted by fear of death, agrees to assume the role of the recognizing self-consciousness and to devote himself to serving the lord. But because the bondsman's consent to serve the lord provides no more than apparent recognition to the latter in the context of the dialectical struggle towards recognition, consent does not play the same kind of decisive role in the struggle as it does in the contract formation. Further, while contract formation is carried out through the bargaining process, the struggle for recognition unfolds through the dialectical process. Finally, while both contract formation and the struggle for recognition involve a desire for some object and an element of recognition, the relative importance of these factors is reversed as we go from the former to the latter. Thus, in contract formation the goal apparently is to secure a coveted good, and mutual recognition as formally equal persons who enjoy freedom to contract is but a necessary means towards that goal.¹⁵⁴ In the struggle for recognition, by contrast, the objects which the bondsman produces for

¹⁵⁰ See Rosenfeld, *supra* note 3, at 830.

¹⁵¹ *Id.* at 792.

¹⁵² See *supra* text accompanying notes 123-26.

¹⁵³ See *supra* text accompanying notes 130-31.

¹⁵⁴ This is true at least in the context of a Hobbesian conception of contract, according to which individuals seek goods in the pursuit of self-interest, but cannot obtain certain of the goods they covet without the cooperation of others. Cf. T. Hobbes, *supra* note 38, at 132-33 (Every member of society having some property cannot assure the survival of the commonwealth. The possession of property must be supplemented by contractual exchanges.).

the lord are but tokens of recognition while recognition itself is the paramount objective sought by the struggling self-consciousness.¹⁵⁵

Notwithstanding these differences, the struggle for recognition is conceptually similar to contract formation in an essential respect. Both involve a confrontation between seemingly independent beings, each seeking to make the greatest possible use of the other while making the smallest possible contribution in return. Yet the process in which they both become engaged—bargaining in the context of contract, the dialectical process in that of the struggle for recognition—leads them to accept voluntarily a very different outcome than that originally hoped for. Indeed, as a consequence of going through this process, each willingly agrees to assume a greater obligation towards the other than originally contemplated in exchange for a seemingly smaller benefit than had been previously sought. Thus, in both contract formation and in the struggle for recognition, the particular process involved transforms one-sided perspectives into positions of equilibrium. In contract, this equilibrium is embodied in equality in exchange; in the struggle for recognition, it is found in equality in recognition. Thus, the process of reciprocal recognition is very much like the process of contract formation. Within the Hegelian framework, however, contract presupposes reciprocal recognition because in the context of the struggle for recognition, equality in exchange is subordinate to equality in recognition.¹⁵⁶

Acceptance of Hegel's postulation of equality in recognition as a prerequisite to legitimate contractual transactions forecloses treating the Hobbesian combination of formal equality and consent as providing a sufficient basis for determining what should count as contract and what should not. Moreover, the Hegelian approach overcomes the circularity of its Hobbesian counterpart. The question remains, however, whether this redefinition of contract as depending on a socially achieved reciprocal recognition can lead to a satisfactory reconciliation of the individual and the communal *within* contract, and whether it can contribute to the determination of the kind of relationship between contract and noncontractual relationships which would be best suited to promote community interests while preserving individual autonomy. To answer this question, it is first necessary to explore the essential common features of those contracts that satisfy the

¹⁵⁵ See *Phenomenology of Spirit*, *supra* note 17, para. 190.

¹⁵⁶ While exchanges between lord and bondsman are not contractual in nature in the struggle for recognition, see *id.* paras. 190-94 (bondsman produces things for the lord because he is servile and lord seeks and accepts such things as tokens of recognition), once equality in recognition has been achieved, the exchange of equivalents through contract can serve as an expression of mutual recognition.

definition of contract in terms of reciprocal recognition. With this in mind, this Article turns to Hegel's account of contract in the *Philosophy of Right*.

In the sociopolitical universe of the *Philosophy of Right*, in contrast to the much more abstract universe of the struggle for recognition in the *Phenomenology*,¹⁵⁷ intersubjective recognition must find determinate forms of embodiment. At the initial stage in the *Philosophy of Right*, recognition finds expression through a subject of recognition who is the abstract person as a bearer of rights, and through tokens of recognition which are meant to circulate among persons and which take the form of alienable property.¹⁵⁸ The abstract person is not yet a full person as she is severed from, among other things, all concrete family relations, the attributes of citizenship, and all roots in historical reality.¹⁵⁹ Nevertheless, the abstract person who possesses an individual will and is a bearer of rights displays a sufficient identity to count as a subject of recognition.¹⁶⁰ Moreover, the tokens of recognition of the abstract person are the possessions over which she believes she has an immediate right of property—a right which presupposes recognition of the possessions as hers by others who assume a duty not to interfere with her enjoyment of her possessions.¹⁶¹

As Hegel indicates, abstract persons first recognize one another as owners of property. Such recognition is equal for everyone, for it is not the nature or quantity of property held by a person which accounts for the kind of recognition the latter receives, but merely the *fact* that she has property—that is, her abstract identity as a property

¹⁵⁷ See *supra* notes 138-39 and accompanying text.

¹⁵⁸ See *Philosophy of Right*, *supra* note 18, paras. 71, 71R:

[P]roperty is . . . an existent as an embodiment of the will, and from this point of view the 'other' for which it exists can only be the will of another person. . . . The sphere of contract is made up of this mediation whereby I hold property not merely by means of a thing and my subjective will, but by means of another person's will as well and so hold it in virtue of my participation in a common will.

. . . .

Contract presupposes that the parties entering it recognize each other as persons and property owners. It is a relationship at the level of mind objective, and so contains and presupposes from the start the moment of recognition

¹⁵⁹ See *id.* para. 40 (in the context of abstract right, "it is only as [property] owners that . . . two persons really exist for each other"); see also *id.* para. 49R (equality of abstract persons is "an empty tautology, for the person, as something abstract, has not yet been particularized or established as distinct in some specific way").

¹⁶⁰ See *id.* para. 51A ("A person puts his will into a thing—that is just the concept of property, and the next step is the *realization* of this concept. The inner act of will which consists in saying that something is mine must also become recognizable by others." (emphasis in original)).

¹⁶¹ *Id.*

owner.¹⁶² Recognition as a property owner, however, is not much of a recognition, for it only involves an act of forbearance whereby the recognizing person refrains from interfering with the recognized person's enjoyment of her possessions. Because the mutual recognition among property owners is equal recognition, a community of property owners who do not exchange possessions would satisfy the minimum conditions which must be met to overcome the struggle for recognition. But if recognition among property owners is minimal, it seems likely to provide its beneficiaries with a low level of satisfaction. To fulfill her yearning for greater recognition, the abstract person must resort to contract. According to Hegel, contract is "the transference of property from one [property owner] to the other in conformity with a common will and without detriment to the rights of either."¹⁶³ Thus, by using items of property as tokens of recognition, abstract persons can confer greater recognition on one another. Indeed, a transfer of property to someone involves greater recognition than mere forbearance from interfering with another's property. Moreover, because the circulation of property in contract is bilateral, and because the items of property which are exchanged in a contract are of equivalent value as tokens of recognition, contract provides equal recognition for all the contractors. Finally, Hegel specifies that contract furthers both the arbitrary will of each one of the contractors and the common will of all of them.¹⁶⁴ That is, each contractor recognizes the will of the other insofar as she gives that other an item of property which that other covets in exchange for an item which she desires. And the contract, as the agreement to exchange designated items of property in the future, enshrines the common will of the contractors, which is the product of a temporary convergence of their respective arbitrary wills. If a contract satisfies the arbitrary will of a contractor, it promotes individual-regarding interests. On the other hand, insofar as it promotes the common will of the contractors, contract also serves to advance collective interests—albeit that "collective" in this context may refer to a small group which may have as few as two members. In fact, as contract promotes the individual will of each of the contractors through their common will and vice versa, it apparently serves the interests of the individual through those of the community—albeit a community of possibly as few as two persons—and vice versa.¹⁶⁵

¹⁶² See *id.* para. 49A.

¹⁶³ *Id.* para. 40.

¹⁶⁴ *Id.* para. 74.

¹⁶⁵ To the extent that the viability of contract depends on the availability of a contract

For Hegel, contract is above all a vehicle for reciprocal recognition, as shown by his distinction between contract and promise and by his adoption of the paradigm of the executory contract over that of the executed or partly executed contract.¹⁶⁶ In Hegel's view, a promise is a subjective expression of an intention to perform some act in the future.¹⁶⁷ Because it is purely subjective, the promisor can still alter it or withdraw it before the time of its contemplated performance.¹⁶⁸ Accordingly, to the extent that a promise confers recognition on a promisee, this recognition remains weak and unstable. On the other hand, Hegel maintains that a stipulation in a contract is tantamount to an alienation of property, even though no transfer has yet taken place.¹⁶⁹ This is because through such a stipulation a contractor already recognizes that the property which she has pledged belongs to the other party to the agreement.¹⁷⁰

Further evidence of the primacy of reciprocal recognition in Hegel's conception of contract—as embraced in the paradigm of executory contract¹⁷¹—is that the legal obligations of the contractors become binding at the time of the making of the contract rather than on receipt of a benefit pursuant to the terms of the agreement. Thus, Hegel rejects Fichte's claim that the legal obligation to keep a contract only begins when the other party starts performing her obligations under the contract.¹⁷² According to Hegel, it is not the performance of one party which triggers the other's obligation to perform, but instead the mutual recognition expressed through the exchange of contractual stipulations. By agreeing to particular contractual terms, the parties have already established a common will, and under these circumstances, actual performance under the contract merely completes what each party already recognized as being prescribed. In Hegel's words, "[t]he embodiment of the will in formal gestures or in explicit and precise language is already the complete embodiment of the will as an intelligent entity, and the performance of the covenant so embodied is only the mechanical

enforcer, the minimum size of the relevant community would have to be at least three persons. See Rosenfeld, *supra* note 3, at 840.

¹⁶⁶ *Philosophy of Right*, *supra* note 18, paras. 79, 79R.

¹⁶⁷ *Id.* para. 79R.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ An executory contract is a "contract in which no performance has yet taken place" and this kind of contract is to be contrasted to the "executed or partially executed contract, that is, a contract in which performance or part performance has already occurred." Rosenfeld, *supra* note 3, at 823.

¹⁷² *Philosophy of Right*, *supra* note 18, para. 79R.

consequence."¹⁷³

While the abstract right of contract promotes equality in recognition and provides some degree of integration between individual-regarding and community-regarding concerns, the kind of equality and harmony which contract in the abstract yields is purely formal. Indeed, all abstract persons are equal. But, as Hegel points out, that merely expresses an "empty tautology"¹⁷⁴ because the very definition of abstract persons as bearers of abstract right imposes equality by completely excluding all particularity that establishes differences among concrete persons and which thus leads to certain inequalities. Similarly, abstract contract involves equality in recognition to the extent that the property exchanged is equivalent in value. Such equivalence, however, is not due to any inherent value of the property to be exchanged, but instead is stipulated as necessarily following from the contractors' willingness to enter into their particular contractual exchange.¹⁷⁵

All contracts require some degree of abstraction, both with respect to the persons entering into contractual relationships and with respect to the property transferred during contractual exchange.¹⁷⁶ Nevertheless, the degree of abstraction displayed by the abstract person found in the initial stage of the *Philosophy of Right* is so extreme that it explains virtually nothing concerning the concrete implications of contract. To be more than an empty construct, contract must therefore involve something beyond disembodied persons acting in a nearly total sociopolitical vacuum. Thus, although it appears from the standpoint of the abstract person that contract depends only on arbitrary will, it turns out that contract cannot truly come to life without the existence of a set of underlying collective norms.¹⁷⁷ In terms of Hegel's dialectic, contract cannot really be meaningful unless it is embedded in the ethical life (*Sittlichkeit*) of a community. In other words, although from the standpoint of the individual contractor contract may seem as nothing but the product of arbitrary will, in fact the very existence of contract depends on adherence to universal community norms that transcend the arbitrary will of any individual and the common will of any set of individuals who have decided to

¹⁷³ Id.

¹⁷⁴ See id. para. 49R.

¹⁷⁵ See id. para. 77 (In contract, "[w]hat remains identical is the value, in respect of which the subjects of the contract are equal to one another whatever the qualitative external differences of the things exchanged.").

¹⁷⁶ See infra notes 203-10 and accompanying text.

¹⁷⁷ See supra notes 87 & 149.

form a contract.¹⁷⁸

Significantly, Hegel places the sociopolitical sphere of contract neither in the initial nor in the final stage of ethical life, but rather in its intermediate stage—civil society.¹⁷⁹ In its immediate manifestation ethical life is represented by the family,¹⁸⁰ an institution which displays collectivist features, contemplates no role for the individual except as a part of the whole, and therefore leaves no room for contractual relationships.¹⁸¹ Following the general pattern of Hegel's dialectic, social organization based exclusively on the family is dissolved because it is inadequate to account for the totality of ethical life.¹⁸² After this dissolution, ethical life becomes alienated from the subject, as it becomes embedded in the sociopolitical organization of civil society. The alienation of ethical life in civil society, in turn, finds expression in the radical split between the subjective individualism of its atomistic members and the objective universality of its community-wide norms.¹⁸³ Moreover, the principal vehicle of intersubjective relations within civil society is contract.¹⁸⁴ From the subjective standpoint of the individual contractor, contract is the instrument of individualism;¹⁸⁵ from the objective standpoint of civil society as a whole, however, contract operates pursuant to universal legal norms and promotes the interests of the community.¹⁸⁶ In civil society, therefore, contract is both individualist and communitarian, or more precisely, it is individualist to the extent that it is communitarian and it can only remain that way because the perspective of the individual remains split from that of the community.¹⁸⁷ However, since civil society cannot ultimately succeed in bringing about the necessary synthesis between the individual and the whole, its perspective is

¹⁷⁸ Cf. *Philosophy of Right*, supra note 18, para. 187 ("individuals can attain their ends only in so far as they . . . [act] in a universal way and make themselves links in [the] chain of social connexions"); id. para. 217 (right becomes determinate when it has been posited as positive law).

¹⁷⁹ See supra note 23.

¹⁸⁰ The three moments of the ethical life are, respectively, the Family, Civil Society, and the State. *Philosophy of Right*, supra note 18, para. 157.

¹⁸¹ See id. paras. 158-81.

¹⁸² Id. para. 181.

¹⁸³ See, e.g., id. paras. 187, 217, 229.

¹⁸⁴ See supra note 23.

¹⁸⁵ This is reflected in the nature of contract since it is an expression of each contractor's abstract will. See *Philosophy of Right*, supra note 18, para. 74.

¹⁸⁶ See supra note 66.

¹⁸⁷ While the individual concentrates on the pursuit of self-interest, the "invisible hand" or more accurately the "cunning of reason" promotes, albeit without complete success, the common interest. See supra note 66; see also *Philosophy of Right*, supra note 18, para. 184A (individual interest furthers the ends of the universal and this in turn furthers individual interests).

dissolved and gives way to that of the state.¹⁸⁸ Within the state, through the work of the dialectical process of the negation of the negation, the subject becomes reconciled with itself and reunited with its ethical life.¹⁸⁹ In the state, individual-regarding interests give way to community-regarding ones and contractual relationships are replaced by consensual ones rooted in the acceptance of common norms.¹⁹⁰ Thus the values of the state, like those of the family, are communal. However, because the transcendence (*Aufhebung*) of contract implies its preservation (in a different relation to the whole) rather than its elimination, the Hegelian state should not be conceived as providing for the end of contract or of individual-regarding concerns. Rather, from the state's perspective, contract is legitimate, but only to the extent that it does not conflict with the ethical life of the community taken as a whole.¹⁹¹

In civil society, contract provides recognition to the individual as being self-subsistent.¹⁹² The self-subsistent being of civil society, however, is not as abstract as the abstract person initially encountered in the *Philosophy of Right*. The self-subsistent individual is embedded in a concrete society, but one that acquires its particular characteristics by first loosening the bonds of family.¹⁹³ In other words, civil society becomes the locus of intersubjective relationships between self-subsistent individuals by first eliminating the primacy of family ties which subordinate the individual to her family unit. Moreover, if we take Hegel's conception of the family as a subject of the ethical life as a general metaphor for all social orders based on status relationships and, in particular, for feudal society with its marked hierarchies and clear subordination of the individual to the whole, then civil society should be viewed as a social order devoted largely to the leveling of hierarchical and status-based relationships. Consistent with this, contract not only provides recognition to self-subsistent individuals severed from their family ties, but also it is an instrument for the repudiation of those preexisting ties that stand in the way of the individual becoming self-subsistent. Contract can only provide recognition to individuals as self-subsistent by refusing to grant any further recognition to the status-based norms and relationships that make self-subsistence impossible. In short, recognition of a person as self-

¹⁸⁸ See *Philosophy of Right*, supra note 18, paras. 255, 255A, 256.

¹⁸⁹ Id. paras. 257-61.

¹⁹⁰ Id. para. 260.

¹⁹¹ See id. para. 261R.

¹⁹² Id. para. 238.

¹⁹³ "[C]ivil society tears the individual from his family ties, estranges the members of the family from one another, and recognizes them as self-subsistent persons." Id.

subsistent through contract is only possible if contract does away with, and replaces, the status-oriented norms and relationships which have thus far linked that person to a social hierarchy.¹⁹⁴

For a person to be self-subsistent in civil society means that she should not be regarded primarily as a family member or as belonging to a particular group. But it does not mean that a person is self-subsistent in the sense that she does not need the cooperation of others to satisfy her needs.¹⁹⁵ Absent set group-related obligations, the self-subsistent person cannot simply expect to receive the assistance of others. Such assistance must be secured instead through contractual relationships. Moreover, recognition of the self-subsistent person cannot be achieved through deference to rank or position in society; it must be recognition as the subject of contractual exchange whose rights and obligations are the product of fully reciprocal voluntary undertakings. And to the extent that recognition is achieved through contractual exchange, the magnitude of the recognition that an individual could obtain would depend on the number of contracts which she enters and the number of contract partners with whom she associates.¹⁹⁶

As long as reciprocal recognition is promoted by the proliferation of contracts, there is a need to ascertain what a person may legitimately alienate through a contract. Hegel asserts that the domain of things that can be alienated legitimately through contract includes all *external* things.¹⁹⁷ This includes not only external objects acquired or produced by a would-be contractor, but also her services and labor power, provided that her labor power is not alienated for a time period that would impair her ability to enter into contracts. As Hegel explains, I can alienate

the use of my abilities for a restricted period, because, on the strength of this restriction, my abilities acquire an external relation to the totality and universality of my being. By alienating the whole of my time, . . . I would be making into another's property the substance of my being, my universal activity and actuality, my

¹⁹⁴ Cf. Rosenfeld, *supra* note 3, at 822 ("one of the prerequisites of freedom of contract was a movement away from the fixed status and pervasively hierarchical relationships of the feudal order").

¹⁹⁵ See *Philosophy of Right*, *supra* note 18, paras. 198-99.

¹⁹⁶ It may be argued that it is not the *quantity* of contracts and the *number* of contract partners that is paramount, but rather the *quality* of the contracts and the *identity* of the contract partners. In a free-market economy marked by an ever-increasing division of labor, however, each individual presumably becomes more dependent on exchanges with others for the satisfaction of her needs. Moreover, as a more specialized producer, each individual in such an economy is capable of satisfying an increasingly narrower range of needs.

¹⁹⁷ See *Philosophy of Right*, *supra* note 18, para. 67.

personality.¹⁹⁸

Consistent with this stipulation, it would seem that a person could both safeguard her capacity to contract and maximize the number of "external" things under her control available for alienation by splitting herself, on the one hand, into an inalienable *ego contractans* and, on the other, into all her alienable attributes and properties which are not required to sustain the *ego contractans*. Accordingly, self-subsistence would seem to mean reciprocal recognition qua *ego contractans* through contractual exchange of all manner of alienable possessions.

The principal reason the self-subsistent person enters into contracts is to obtain recognition through the exchange of alienable property. The alienable property received by a contractor should therefore be conceived as a token of recognition.¹⁹⁹ Such token, however, should not be considered as merely arbitrary in nature, but rather as uniquely suited to satisfy a particular desire. Indeed, the contractor's desire for recognition which prompts her to enter into a contract does not take the form of a general undifferentiated desire, but that of a well-defined particular desire.²⁰⁰ The self-subsistent person does not

¹⁹⁸ Id.

¹⁹⁹ Hegel asserts that civil society—which is the locus of private contractual relationships—recognizes the individual as a self-subsistent person. Id. para. 238. In the context of the family, by contrast, the individual's identity is inextricably linked to her membership in a particular family group. See id. para. 158. To the extent that family relationships become subordinate in civil society, each person needs to seek recognition in her individual capacity, and contract becomes a particularly well-suited vehicle for the achievement of individual recognition.

²⁰⁰ In the case of contract, recognition is arguably subordinate to the satisfaction of a particular desire. While this argument may be valid in the context of a Hobbesian conception of contract, it is unpersuasive in the context of Hegel's system. Indeed, a retracing of the journey undertaken by self-consciousness in the *Phenomenology* of the progression of the ethical substance from the family to civil society, and from the latter to the state in the *Philosophy of Right*, indicates that the ultimate aim of the Hegelian subject is not the satisfaction of arbitrary whims, but rather the reconciliation of individual and community, of the particular and the universal, and of *being-in-itself* and *being-for-itself*. See, e.g., id. paras. 260, 260A, 261, 261A. Such reconciliation, moreover, can only be achieved if social cohesion derives from intersubjective recognition rather than from some program imposed from "above." Accordingly, while even Hegel acknowledges that in the context of civil society individuals seek to satisfy needs, "accidental caprices," and "subjective desires," and that such satisfaction "breeds new desires without end," id. para. 185, consistent with the Hegelian system taken as a whole, the satisfaction of a particular desire must be viewed as yet but another instance of self-consciousness' search to fulfill its desire for recognition. Thus, it is because she is stripped of her family and group affiliations that the individual in civil society must seek recognition through what is indisputably hers, namely her (right to) property. Moreover, insofar as greater recognition is obtained by acquiring and transferring property rather than by merely possessing it—that is, one is more likely to be noticed in the course of one's acquisitions and dispositions of property than in the course of one's quiet enjoyment of one's existing possessions—the desire for recognition would seem to require an endless chain of acquisitions and dispositions of property. Under these circumstances, insatiable desire for an infinite number of objects is but the reflec-

seek unmediated general recognition but instead specific tokens of recognition in the form of objects capable of satisfying particular desires. Presumably the person who contracts views the satisfaction of her particular desires as a form of individualized recognition that is superior to general undifferentiated recognition. In general, by particularizing recognition through exchanges designed to satisfy specific desires, and by multiplying the occasions for such exchanges to take place, recognition can be both individualized and intensified. Thus, achieving greater reciprocal recognition seems possible through the constant exchange of external property uniquely suited to satisfy particular desires.²⁰¹ As in the early part of the *Phenomenology*, the subject seeks to satisfy desire through consumption of an external object,²⁰² but here the object involved in contract is the product of another subject and hence serves to mediate between these subjects. On the other hand, to the extent that one subject looks to another subject for the production (or delivery) of an object suited to fulfill the first subject's desire, the contractors in civil society resemble the struggling lord and bondsman. Since the relationship between the contractors is fully reciprocal, however, it overcomes the instability that afflicts the relationship between lord and bondsman.

Recognizing the self-subsistent person through contractual exchanges involves extreme abstraction of the subject of recognition and extreme fragmentation and particularization of that subject's desires.²⁰³ What is recognized is the *ego contractans* which appears to

tion of the never-ending search for recognition of the individual member of civil society who operates as though she has been severed from all forms of group affiliation.

²⁰¹ This may seem counterintuitive, particularly where individuals enter into contracts to satisfy their basic subsistence needs. At least in those cases, it may be claimed that recognition plays a secondary role to the satisfaction of a material need. A Hegelian might counter, however, that while basic subsistence is a necessity, it should be viewed as a prerequisite to the achievement of full recognition, and therefore it should be subsumed under that goal. In other words, subsistence may be the immediate aim, but without the achievement of recognition, mere subsistence would be profoundly unsatisfactory to a human being in her capacity as an ethical subject. Further, even in Adam Smith's market society, once one moves beyond the satisfaction of basic needs, it seems entirely plausible to maintain that the search for greater profits and greater wealth is primarily a search for greater recognition rather than for the particular objects which greater wealth can purchase.

²⁰² See *supra* text accompanying note 108.

²⁰³ As Hegel states, in civil society "on the one side there is the particularity of need and satisfaction, reflected onto itself, and on the other side the universality of abstract rights." *Philosophy of Right*, *supra* note 18, para. 255. Further, Hegel maintains that "the means to particularized needs and all the various ways of satisfying these are themselves divided and multiplied and so in turn become proximate ends and abstract needs. This multiplication goes on *ad infinitum* . . ." *Id.* para. 191. See also Rosenfeld, *supra* note 3, at 815-17 (discussing the role of contract in the abstraction of the particular and the particularization of the abstract).

be the reincarnation of the abstract person with its abstract rights; but this time it is inserted in a concrete sociopolitical milieu in which it emerges as a consequence of the systematic dismantling of status-based relationships. On the other hand, the subject of recognition, to multiply the instances of recognition and to maximize the intensity of the feeling of being recognized, particularizes and individualizes desire so that each contractual exchange may satisfy a particular, separable individual desire. Moreover, the more arbitrary and capricious a particular individual desire is, the more its satisfaction seems likely to intensify its owner's feeling that she is being recognized as the unique individual that she aspires to be. In this way, there is a correspondence between the increasing abstraction of the subject of recognition as *ego contractans* and the increasing particularization of her desire. In fact, these two phenomena are but the two principal manifestations of a single process that simultaneously produces the abstraction of the particular and the particularization of the abstract.

We have thus far concentrated on the subject of recognition, but the simultaneous process of increasing abstraction coupled with increasing particularization affects the objects of exchange which are put into circulation as tokens of recognition. As already mentioned, the locus of contractual exchange in the context of civil society is the free economic market.²⁰⁴ In a fully developed market economy, all objects of exchange—which include both goods and services—must be commensurable. To be in the chain of exchange and to become susceptible to being traded for an equivalent object—a necessary prerequisite for achieving equality in recognition through contract—an object must have a separate and distinct exchange value. This means that abstraction must be made from the bundle of manifold concrete determinations of an individual object to ascribe a quantifiable exchange value to it.²⁰⁵ Nevertheless, although understanding objects of exchange in terms of their exchange value is essential for rational market transactions, perception of such objects exclusively in terms of that value is insufficient to account for contractual relationships. Indeed, if individual contractors seek recognition in the form of satisfaction of particular desires, exclusive focus on exchange value, which makes all objects of exchange essentially fungible, fails to achieve an acceptable level of differentiation. Accordingly, to become desirable to a potential consumer, an object of exchange must display sufficient particularization to appear capable of satisfying that consumer's par-

²⁰⁴ See *supra* notes 65-66 and accompanying text.

²⁰⁵ See Rosenfeld, *supra* note 3, at 834.

ticular need or desire.²⁰⁶ In sum, for an object to be suitable for contractual exchange, there must be abstraction of the particular to extract a commensurable exchange value. There must also be particularization from the abstract—that is, a process whereby the object is perceived as unique notwithstanding the characteristics it shares with other objects. In the context of a consumer seeking to satisfy a specific clearly defined individual desire, it is necessary to produce a sufficiently differentiated use-value to justify that potential consumer's choosing the object in question above all others.

Abstraction of the particular and particularization of the abstract pull in opposite directions and thus threaten to undermine the recognition sought through contract. The *ego contractans*, understood as the inalienable core of the person which becomes separated from the rest through the process of abstraction of the particular, is but a formal shell. Under these circumstances, reciprocal recognition is reducible to equal recognition as an *ego contractans*, amounting to little other than the establishment of formal equality.²⁰⁷ Therefore, individuality, self-subsistence, and equality are purchased at the cost of vacuity. On the other hand, particularization of the abstract compartmentalizes desire so that it can be given piecemeal satisfaction through contractual exchange.²⁰⁸ Taken to its logical extreme, however, the fragmentation of desire could so completely separate individual desires from the background from which they emerge that satisfaction of particular desires could no longer be perceived as a form of recognition. In other words, if fragmentation of desire dissolves the unity of the person, then satisfaction of a particular desire may be akin to quenching a particular thirst but could hardly contribute to the maintenance of a sense of recognition. In the last analysis, through the combined work of the abstraction of the particular and the particularization of the abstract, the ego becomes an empty unity while desire is fragmented into an irreducible multiplicity of disparate atoms. Once that happens, contract becomes meaningless.

Because the same process that sustains contract eventually leads to its dissolution, contractual relations must be bounded by noncontractual ones.²⁰⁹ Before exploring the boundaries of contract as conceived by Hegel, it is necessary to focus on some of the other apparent contradictions that emerge from the preceding account of contractual

²⁰⁶ Id. at 835-36.

²⁰⁷ Cf. Philosophy of Right, *supra* note 18, para. 49R ("[I]n respect of their personality persons are equal. But this is an empty tautology, for the person, as something abstract, has not yet been particularized or established as distinct in some specific way.").

²⁰⁸ See Rosenfeld, *supra* note 3, at 836.

²⁰⁹ See *supra* note 87.

relationships. First, the self-subsistent person who contracts to satisfy her desires turns out to be completely dependent on others to achieve her aims. Second, there is a marked contrast between use-value, which seems purely subjective, and exchange value, which seems objective. Third, since satisfaction of desire requires reciprocation, and since recognition demands satisfaction of an increasing number of particular desires, the person who desires recognition must devote a greater portion of her time to work—that is, “other” than satisfying desires—to keep up with her obligations to reciprocate. And fourth, contract seems to depend simultaneously on the individual’s arbitrary will and on adherence to universal norms that are binding on the whole community.

All four of these apparent contradictions can be understood as diverse manifestations of a single phenomenon—the alienation of ethical life in civil society.²¹⁰ This alienation of the ethical life results in the radical split between the subjective and objective points of view.²¹¹ Moreover, what is remarkable about this phenomenon is not the split itself—which is characteristic of all but the last of the various stages of Hegel’s dialectic²¹²—but rather that in civil society, the split between the subjective and the objective constitutes the very foundation upon which contractual relationships must stand to become suitable vehicles for the expression of reciprocal recognition.²¹³ Indeed, recognition itself is only intelligible in terms of both identity—that is, a common intersubjective collective denominator—and difference—

²¹⁰ Following the general pattern of Hegel’s dialectic, ethical life is divided into three moments. The first moment, which is the stage of the family, is immediate. On the other hand, in the second stage, civil society, immediacy is lost, and the ethical substance that glues together the individual members of civil society becomes alien as they remain unaware that they are united by the ethical substance. Only in the last moment of the ethical life, when the alienation of individuals is removed, is the internal link between individual, society, and ethical substance fully reinstated at a higher and more fully conscious level of integration, and governed by reason. See *Philosophy of Right*, supra note 18, para. 157; C. Taylor, supra note 16, at 431.

²¹¹ See supra text accompanying notes 182-83.

²¹² Viewing the matter from the standpoint of the *Logic*, for example, the Hegelian dialectic is a retracing of the journey of the Idea. As Charles Taylor notes, the Idea is “a process of positing its other and then recovering its unity with itself in its other. This process is a dialectical one. It is a struggle. . . . The whole system hangs together by contradiction and struggle.” C. Taylor, supra note 16, at 330. But whereas the *process* of the realization of the idea is marked by stages characterized by the split between the self and its other, at the culmination of the process, in its ultimate realization as the absolute, the Idea reunites self and other, and encompasses everything within itself. See *id.* at 330-31.

²¹³ As Hegel writes,

Though in civil society universal and particular have fallen apart, yet both are still reciprocally bound together and conditioned. While each of them seems to do just the opposite to the other and supposes that it can exist only by keeping the other at arm’s length, none the less each still conditions the other.

Philosophy of Right, supra note 18, para. 184A. See *id.* paras. 183-87.

that is, a particularity or individuality that makes it possible to distinguish one person from another. Contract, in turn, is that means of recognition which remains viable only to the extent that individual contractors remain unaware that the individuality which they seek to have recognized is ultimately defined in terms of the common intersubjective meanings that make identity possible.²¹⁴ In short, contract is the form of reciprocal recognition of those who fail to realize that identity and difference are two sides of the same coin—that is, spirit (*Geist*) or the absolute subject.²¹⁵

In light of this, these four apparent contradictions can be viewed as aspects of the same major split between the subjective and the objective standpoints. On the subjective side, we have the self-subsistent person who seeks to obtain and consolidate recognition through the satisfaction of an increasing number of particular desires, each requiring a distinct object which is made suitable by its use-value. Moreover, the particular form of each concrete desire is the product of the arbitrary will of the desiring subject. On the other hand, on the objective side, we have a community of mutually dependent persons connected through contractual relationships—since other types of social relationships such as status or family relationships become eliminated or significantly weakened in civil society—made possible by the commensurability of objects of exchange as expressed in their exchange-value. Further, since contractual relationships impose the norms of equivalence and reciprocity, the satisfaction of the desire for recognition and the need for survival require members of society to work and to produce goods that are suitable for exchange. Thus, from the objective perspective, a contract-based society is as much a society of producers as it is one of consumers.²¹⁶ Finally, contractual relationships can only take place in the context of operative collective norms.²¹⁷ To the extent that the collective norms underlying family and status-based relationships erode in civil society, a regime of contract requires establishing a new set of collective norms. Also, unlike collective norms associated with status-based relationships, which may be applicable only to a particular segment of the community—

²¹⁴ Cf. A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 477-78 (E. Cannan ed. 1976) (1776) ("By pursuing his own interest [the individual] frequently promotes that of society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good.").

²¹⁵ For a thorough and enlightening discussion of Hegel's notion of *Geist* or cosmic spirit, see C. Taylor, *supra* note 16, at 80-94.

²¹⁶ In Hegel's view, "[t]he means of acquiring and preparing the particularized means appropriate to our similarly particularized needs is work." *Philosophy of Right*, *supra* note 18, para. 196.

²¹⁷ See *supra* note 87 and accompanying text.

for example, norms of conduct applicable to feudal lords but not to their serfs—collective norms defining the contours of valid contractual exchange must be universal in their application.²¹⁸ Hence, a community of mutually dependent persons who are linked by a series of contractual relationships must jointly adhere to a set of universally applicable legal norms without which reciprocal recognition through contract would be altogether impossible.²¹⁹

In the context of the split between the subjective and the objective perspectives prevalent in civil society, contract appears to combine individual-regarding and community-regarding concerns in two different ways. First, consistent with Hegel's general methodological approach, what appears to be individual-regarding, from the standpoint of the person engaged in contractual relationships within the confines of civil society, can be perceived as a community-wide process from the standpoint of the philosopher looking at civil society from a later perspective that transcends civil society's contradictions. Thus, the individual contractor believes she is engaged in the exclusive pursuit of self-interest, but through the cunning of reason, as it becomes apparent to the philosopher, she is actually laboring for the commonweal, and, in doing so, acting in accordance with universally applicable community norms.²²⁰

Second, contract seems to recast the relationship between individual-regarding and community-regarding concerns in terms of opposition and contradiction. Indeed, to the extent that contract plays a role in undermining status-based social roles and relationships, it is put to use *against* community-based norms and collectively generated identities.²²¹ For example, the use of contract to replace custom as

²¹⁸ In civil society, rights are by necessity universal. *Philosophy of Right*, supra note 18, para. 229A.

²¹⁹ See *id.* para. 217.

²²⁰ See *id.* para. 199. In civil society, subjective self-seeking turns into a contribution to the satisfaction of the needs of everyone else. That is to say, by a dialectical advance, subjective self-seeking turns into the mediation of the particular through the universal, with the result that each man in earning, producing, and enjoying on his own account is *eo ipso* producing and earning for the enjoyment of everyone else.

Id. (footnote omitted).

²²¹ See Rosenfeld, supra note 3, at 821-23. From a Hegelian perspective, since contract is ultimately grounded in noncontractual collective norms, it could not be used to set aside community-based norms and collectively generated identities *in general*. Indeed, although the individual contractor seeking to satisfy her arbitrary will may perceive contract as a means of leveling community-based norms which interfere with her particular aims, the philosopher may perceive contract as a means to set aside *certain particular* community-based norms to make room for *other particular* community-based norms which underlie and make possible the kind of contractual relationships that are within the reach of would-be individual contractors. As Drucilla Cornell has convincingly argued, contractual relationships for Hegel presuppose

the means to determine the nature and scope of certain intersubjective relationships signifies both the negation of the applicability of collectively adopted substantive norms and the assertion that these relationships are produced by the confluence of the individual contractors' arbitrary wills. Also, as the rights and duties of the contracting parties are not defined relative to status-based roles such as lord, bondsman, father, or member of a particular tribe—or put another way, as these roles are irrelevant for the purpose of determining contractual rights and obligations—contract denies recognition to collectively determined status-based identities to accord recognition to persons as self-subsistent individuals.²²² Similarly, looking at the objects traded through contract, individual desires apparently replace substantive collective norms as the determining factor in setting exchange-values.²²³ This means that precontractual—or preefreedom of contract, if contract, but not the freedom to choose essential contract terms, has been institutionalized—collectively set exchange values must be rejected to recognize the particular exchange value which emerges from the confluence of arbitrary wills that determines the actual terms of exchange. The arbitrary will, in addition to its usefulness in dislodging traditional collective values, can also be an important weapon against the future imposition of substantive collective norms.²²⁴

the existence of a social ontology. See Cornell, *Dialogic Reciprocity and the Critique of Employment at Will*, 10 *Cardozo L. Rev.* 1575 (1989).

²²² Consistent with the observations made *supra* note 221, recognition of persons as self-subsistent does not necessarily imply the rejection of contract as based on communal norms and the adoption of an individualistic perspective. Indeed, in the civil society context, perception of the individual as self-subsistent plays an important *collective* function just as the pursuit of self-interest does in Adam Smith's free market society. See *supra* note 214. In the latter case, through the collective mechanism of the "invisible hand" of competition, individual self-interest contributes to the common good. See A. Smith, *supra* note 214, at 477. Also, in Hegel's civil society, promotion of self-subsistence leads to interdependence and to promotion of the common good. See *Philosophy of Right*, *supra* note 18, para. 199. Both Adam Smith and Hegel justify the pursuit of individual-regarding interests from the standpoint of collective concerns. Hegel's civil society is but an intermediate stage of the ethical life which eventually must be transcended (*Aufgehoben*). The collective justification for positing the individual as self-subsistent (so that she can better contribute to the common good) is partial and limited. But within this limited context, it is important that the individual think that she is only working for herself because she is thus more likely to make a greater contribution to the common good.

²²³ While the collective institutions of civil society may require that the individual believe that her desires are idiosyncratic and fully generated "from within," in fact individual desires are more likely highly dependent on collective processes and intersubjective relationships. Cf. *Philosophy of Right*, *supra* note 18, para. 191A ("the need for greater comfort does not exactly arise within you directly; it is suggested to you by those who hope to make a profit from its creation"); J. Galbraith, *The Affluent Society* 127 (1976) (consumer wants are to a large extent created by producers).

²²⁴ Encouraging the expression of what appears to be a purely arbitrary will perpetuates the perceived split between the individual and the communal, and thus discourages the search for

Thus, freedom of contract—which is the principal vehicle for the expression of arbitrary will—can be invoked as a shield against proposed changes or reforms that would reintroduce certain substantive community-regarding norms.

The two ways in which contract operates on the relationship between individual-regarding and community-regarding concerns are apparently contradictory. According to the first way, contract consciously pursues individual-regarding objectives but unknowingly achieves community-regarding aims. According to the second way, however, contract apparently promotes individual-regarding objectives at the expense of community-regarding ones through the negation or suppression of community norms. This produces an apparent inconsistency as contract simultaneously seems to promote and undermine community-regarding objectives.

To bridge this gap between these two seemingly disparate approaches, one must remember that in civil society the subject is alienated from the ethical life.²²⁵ “Alienation” can be understood in two different senses: either as merely involving estrangement or as also encompassing hostility. The first approach reflects the perspective of a subject who is alienated from the ethical life in the sense of being estranged from it, of not realizing that such ethical life—which presents itself as a given that has an external existence independent of the subject—is, in the last analysis, the product of the subject’s own free will. The second approach is that of a subject who is alienated from the ethical life in the sense of being hostile toward it—of wanting to suppress it as an alien intrusion upon her free will.

Although it appears that under the first approach the subject merely ignores ethical life, while under the second she endeavors to eliminate it altogether, on closer scrutiny the latter impression is misleading. It is true that hostility is more prone to lead to destruction than is mere estrangement. The destruction wrought by the hostile subject under the second approach, however, is not of ethical life itself but rather of a particular version of it.²²⁶ What the subject who enters into contractual relationships tends to destroy are those ethical and customary (status-based) norms which impede freedom of contract. This destruction, however, is not the work of anarchy; the discarded status-based norms are replaced not by a lawless state of nature, but

substantive communal values to be *consciously* implemented in connection with the pursuit of “private” concerns.

²²⁵ See *supra* note 183 and accompanying text.

²²⁶ See *supra* note 221.

by an orderly and cohesive network of contractual relationships.²²⁷ But because the subject under the second approach is as estranged from the ethical life she produces as she is under the first, she fails to perceive that contract and the set of norms and institutions necessary to sustain it also give expression to community-regarding concerns.

The two approaches are thus two aspects of the same process. Moreover, this process comprises the rejection of the status-based ethical life of the family in favor of the ethical life of civil society. Civil society, however, produces between the subjective and objective realms a sharp dichotomy which conceals from the subject the community-regarding dimension of her conduct and her relationships.²²⁸ In other words, her alienation from the ethical life leads the member of civil society to approach her contractual relationships as though they were purely individual-regarding. But, Hegel's methodology allows us to see that, from the perspective of a subsequent stage in the dialectic, contractual relationships have community-regarding aspects as well. Also, by looking at civil society from the standpoint of a subsequent, more comprehensive perspective, one should be able to discover the actual relationship between the individual-regarding and the community-regarding aspects of contract.

The community-regarding aspects of contract run much deeper than might at first be believed. In fact, even if desire is sufficiently particularized and individualized (through particularization of the abstract) to be satisfied by a single object, it cannot be exclusively individual-regarding if it is subject to fulfillment by means of contractual exchange. If the desire were purely individual, it could not be communicated. Accordingly, even if the source of desire were exclusively within the individual, such desire could not be satisfied through contract unless it could be expressed in a language understood by all of the prospective parties to a proposed contractual exchange. Moreover, insofar as consumption and production are two interrelated aspects of the same process by which recognition can be maximized through contract, the shape of particular desires may be as much influenced by the requirements of production as by those of consumption.²²⁹ It may not have been evident in Hegel's time,²³⁰ but there can be little question in modern consumer society that producers seek to create consumer demand for new products through advertising and

²²⁷ See *Philosophy of Right*, *supra* note 18, paras. 217, 217A.

²²⁸ See *supra* notes 213 & 220.

²²⁹ See *supra* note 223.

²³⁰ Although Hegel was clearly aware of producers' stimulating effect on consumer demand. See *id.*

marketing practices. And even if one did not believe that particular desires could be the exclusive product of the social practices of those who seek to generate demand for hitherto unknown consumer goods, it would seem difficult to deny that such desires are at least in part given determinate content by such social practices.²³¹

If one admits that particular desires for consumer products are, at least in part, socially determined, then one should have no difficulty in accepting that other essential ingredients of contract are also substantially dependent on community norms and practices.²³² In particular, contract formation, contract interpretation, and contract enforcement would all be impossible absent a common language and collective legal norms and standards embodied in a universally applicable law of contracts.²³³ Also, if the use-value of the goods and services subject to contractual exchange is at least in part socially determined, it should be obvious that their exchange value depends on intersubjective rather than merely individual determinations.²³⁴ In short, recognition through contractual exchange emerges as a socially grounded practice. Indeed, the particular forms of desire which it generates and the products which it chooses as the means to satisfy such desire, as well as the common language which it must use and the norms and standards to which it must refer, all ultimately have their roots in the community.

If contract is so thoroughly rooted in the community, one wonders if all its individual-regarding aspects are reducible to some form of social determination. According to Hegel, what distinguishes contractual relationships from other kinds of relationships is that contractual ones are always the expression of arbitrary will,²³⁵ which is an individual will or a will that contains an irreducible individual component. The question thus becomes: How can arbitrary will, which can seek and obtain recognition and achieve expression only through collectively grounded norms and practices, consistently remain in any significant sense irreducibly individual?

The answer lies in the fact that, even if all that goes into making the arbitrary will is socially determined, the arbitrary will cannot be fully understood in terms of any set of socially determined coordi-

²³¹ Cf. J. Galbraith, *supra* note 223, at 127 (producers shape consumer wants).

²³² Even from the most rigid individualistic perspective, individual desire must remain the most intensively private experience associated with contractual exchange. Indeed, contract making, contract executing, and contract interpretation are all necessarily intersubjective in nature.

²³³ See *supra* text accompanying notes 99-102.

²³⁴ See Rosenfeld, *supra* note 3, at 833-39.

²³⁵ See *Philosophy of Right*, *supra* note 18, para. 75.

nates. In other words, while all the constituent elements of the arbitrary will may be socially determined, the arbitrary will is not reducible to the sum of its constituent elements. As Walton observes:

It is central to Hegel's view that there is necessarily a social dimension to the determination of personal goals. But that does not, however, entail the further proposition, that individuals cannot have exclusively personal goals and that there is only available to them the alleged "higher" purposes of the community as a whole.²³⁶

Thus, while the choice which every individual contractor must make to enter into a contractual relationship is socially determined, it nevertheless possesses an arbitrary and capricious quality. That quality can neither be reduced to the social determinants of the choice in question nor be dispensed with. Indeed, in the absence of the arbitrary will it would be impossible to explain why a person chose to enter into any one particular contractual relationship rather than another.

To better understand how contract can preserve an irreducible individual-regarding quality even though it is thoroughly embedded in a social context, it might be useful to draw an analogy with the relationship among statements in a language and the rules and conventions of language use. As Walton observes, in the context of the relation between the individual and the social in Hegel's political philosophy,

the moment of particularity is deeply embedded in the experience of contemporary man, and the social context stands in relation to the individual rather as the rules and conventions of language use stand for individual statements. That is they do not determine what should be done, but they do provide criteria of intelligibility and mutual understanding.²³⁷

Similarly, the legal rules and standards and the social conventions applicable to contracts can be viewed as a kind of language, while particular contracts can be conceived as being analogous to individual statements within that language.

To the extent that Hegel's civil society is coextensive with Adam Smith's economic marketplace, the irreducible individual-regarding aspect of contract plays an important role in securing the social welfare. As discussed in Part I, both Hegel and Adam Smith believe that competition among individuals seeking self-interest can lead to the

²³⁶ Walton, *supra* note 78, at 88.

²³⁷ *Id.* at 88-89.

common good.²³⁸ Moreover, Adam Smith specifies that if the individual voluntarily abandons her pursuit of self-interest to pursue directly the common good, she is less likely to contribute as much to the common good as she would if she single-mindedly persisted in the exclusive pursuit of self-interest.²³⁹ Similarly, if the Hegelian subject operating within civil society were to renounce her arbitrary will and seek to conform to the universal will, she would most likely contribute less to her community than if she simply followed the dictates of her arbitrary will. Therefore, not only is Hegelian contract irreducibly individual-regarding insofar as it is an expression of arbitrary will, but also the free pursuit of arbitrary will is likely to promote community welfare within the realm of civil society.²⁴⁰ Consistent with the preceding observations, it also becomes apparent that the alienation of ethical life from the subject contributes to the proper functioning of civil society. Indeed, if the subject perceived ethical life as the product of her own will, she would not feel free to pursue the dictates of her arbitrary will; yet without such pursuit she could not achieve the greatest possible reciprocal recognition. To succeed in obtaining the greatest possible amount of recognition within the confines of civil society, therefore, the subject has to be both alienated from her own ethical life and capable of using the language and tools of her community to carve out her own arbitrary will designed to oppose the collective interests of the community as a whole.²⁴¹ Thus, paradoxically, in civil society the individual comes out of the social but transcends it, and at the same time the individual best promotes the social by opposing it. Contract serves to produce both these results and thus promotes both individual-regarding and community-regarding aims, by framing the social underpinnings of the individual's arbitrary will and by becoming the principal vehicle of the individual's opposition to the social, which is likely to enhance the common good.

Under optimal conditions, in civil society contract provides reciprocal recognition by promoting the constant circulation of an increasing number of tokens of recognition which acquire meaning through the common language of contract, but which sustain the individuality of each contractor by providing her with recognition as the subject of arbitrary will. Because of the split between the subjective and objective perspectives, tokens of recognition are at once commensurable as objects inserted in the flow of exchange and unique insofar

²³⁸ See *supra* note 66 and accompanying text.

²³⁹ See *supra* note 214.

²⁴⁰ See *supra* note 220.

²⁴¹ See *Philosophy of Right*, *supra* note 18, paras. 217, 217A (In civil society contractual forms are fixed and determinate.).

as they reflect the individuality of particular expressions of arbitrary will. As commensurable, such tokens make it possible to achieve equality in recognition. As unique, on the other hand, they underscore the irreducible individuality of each arbitrary will. Thus these tokens of recognition promote both identity and difference. Identity, which is established through equivalence in exchange, remains within the realm of the objective and thus beyond the grasp of the perspective of the subjective. By contrast, difference, which is nurtured by the arbitrary will, remains squarely within the sphere of the subjective perspective. If identity and difference could be reconciled, the opposition between the individual and the collective would collapse. As we have already seen, however, one of contract's principal roles is to prevent the full reintegration of identity and difference so as to preserve an opposition between the individual and the community. The reason for sustaining such an opposition is that ideally it should insure an equilibrium which would obliterate neither the individual nor the group.

Hegel, as we know, does not believe that a free market economy ultimately can secure the common good or that the ethical life can be fully achieved from the perspective of civil society.²⁴² Accordingly, contract, as the principal vehicle of intersubjective relationships in civil society, ultimately cannot secure an adequate equilibrium between individual autonomy and social welfare. Because contract recognizes only self-imposed obligations and because it secures individual rights, it may seem at first that it is well suited to preserve individual autonomy, and only fails to promote social welfare to the extent that the free market economy does not necessarily provide subsistence for all members of society. Actually, as Hegel suggests, rights and welfare are linked inasmuch as one is of little value without the other.²⁴³ Logically, there cannot be genuine autonomy without a minimum of welfare, and hence, inasmuch as it fails to promote welfare, contract must also fail to preserve autonomy.²⁴⁴ Moreover, since autonomy can be expressed in terms of recognition of the person as self-subsistent, it would seem that the shortcomings of the free market

²⁴² See *supra* note 68 and accompanying text.

²⁴³ See *Philosophy of Right*, *supra* note 18, para. 130 ("Welfare without right is not a good. Similarly right without welfare is not the good . . ."); *id.* para. 195TN ("[C]ivil society, as a phase of ethical life, is the *synthesis* of right and welfare." (emphasis in original)).

²⁴⁴ Cf. *id.* para. 229A (Right in civil society "has a bearing simply on the protection of property; welfare is something external to right as such. . . . Hence the universal, which in the first instance is the right only, has to be extended over the whole field of particularity."). Property rights alone or freedom of contract as an extension of property rights cannot secure everyone's welfare. To establish such welfare civil society must have good laws and rely on public authorities and group associations. *Id.*

economy as perceived by Hegel threaten to undermine the achievements of contract as a vehicle of reciprocal recognition.²⁴⁵

One can approach the above threat to the success of contract as reciprocal recognition from the perspective of the inner dialectics of contract. Contract distinguishes between the *ego contractans* and her alienable "external" possessions.²⁴⁶ Under optimum conditions, the *ego contractans* as a full-fledged person alienates the objects produced through her labor as tokens of recognition in exchange for equivalent tokens capable of satisfying her particular desires, thus boosting her sense of being granted recognition. So long as a society consists of individual producers who have surplus products that they can trade, and contractual exchanges promote both autonomy and welfare, contract seems bound to enhance mutual recognition and to foster independence through interdependence. If contract fails to contribute to increased welfare, however, the picture becomes quite different.

Decreases in overall welfare—or even the creation of wide discrepancies in wealth without any change in overall welfare—are bound to leave certain individuals without any surplus goods to exchange. For such individuals, achieving reciprocal recognition becomes much more onerous than for those who enjoy ample surplus goods. For example, a person whose only "external" alienable possession is her own labor power must secure equal recognition by contracting to work for another. By contrast, an independent producer who owns surplus goods seems capable of achieving recognition without having to sacrifice as much. Indeed, the person who must alienate her labor power gives up control over her activities as a producer in a way that a person who works for herself does not. More generally, achieving reciprocal recognition, taken to its logical extreme, may require the most destitute individuals to sacrifice everything except their capacity to contract while only requiring the wealthiest individuals to part with surplus objects for which they have no more than a purely peripheral interest. Also, viewing the matter from the standpoint of the person to be recognized, what is given recognition in the case of the destitute person is merely her capacity as an *ego contractans*, while in that of the wealthy individual it is a much fuller version of human personality endowed with greater capacities for creativity and enrichment. What remains equal in contract are the tokens of recognition which are exchanged.²⁴⁷ Otherwise, disparities in wealth are

²⁴⁵ Indeed, to the extent that contract fails to secure the basic welfare of a person, it also fails to provide that person with a sufficient measure of recognition.

²⁴⁶ See *supra* text accompanying notes 197-99.

²⁴⁷ See *Philosophy of Right*, *supra* note 18, para. 77 ("What remains identical is the value,

prone to lead to contracts requiring inequalities in both burdens and benefits. Those inequalities are not ones that contract alone can eliminate.

In the context of great discrepancies in wealth, not only does contract demand that some make sacrifices going virtually to the core of their being while others only need to make superficial concessions, but also the effect of receiving a particular token of recognition is likely to vary significantly depending on a person's standard of living. Indeed, the wealthier a person happens to be, the more likely it is that she will be able to procure a greater number of tokens of recognition from a large number of individuals. While some such tokens may be more important to their recipient than others, generally speaking, the relative value to a recipient of an individual token will decrease as the wealth of that recipient increases.²⁴⁸ Thus, while tokens of recognition that are actually exchanged are equivalent by definition, the token received by a contractor who possesses very little is likely to mean much more to her than the token received in exchange by a much wealthier contractor is likely to mean to that contractor. For example, the recognition obtainable through an employment contract is likely to mean much more to the person seeking employment than to the employer who has thousands of employees. For the prospective employee, the job would provide a substantial part of the recognition that she is likely to receive. For the prospective employer, on the other hand, employing one person more or less is highly unlikely to affect the recognition one receives as a large and influential employer.²⁴⁹ Hence, equal tokens may be of unequal worth to their respective recipients.²⁵⁰ And when we add the facts that contractual exchanges of equal tokens of recognition may lead to inequalities in the kinds of recognition which may be received as well as the inequalities in the benefits, burdens, and worth of recognition, it becomes clear that, in the context of great disparities of wealth, contract achieves formal equality in recognition while at the same time leads to great substantive inequalities in recognition.

The inner dialectics of contract also lead to other contradictions

in respect of which the subjects of the contract are equal to one another whatever the qualitative external differences of the things exchanged.").

²⁴⁸ While a wealthy person may attach much importance to every object which she seeks to acquire, the *relative* importance of each individual acquisition would tend to decrease as the total number of such acquisitions increased.

²⁴⁹ In other words, it may be crucial to the employer's self-esteem to be recognized as an employer of one thousand employees, but any particular employment relationship is unlikely to affect the image that the employer wants others to recognize.

²⁵⁰ Cf. J. Rawls, *A Theory of Justice* (1971) (equal freedom distinguished from the equal worth of freedom).

besides that between formal equality and substantive inequalities in recognition. One of these contradictions is that between consumer and producer, which reproduces at a different level of abstraction part of the dialectic surrounding the struggle between lord and bondsman. Seeking enhanced recognition through contract presupposes that the road to reciprocal recognition is through satisfaction of particular desires—that is, through fulfillment of consumer wants. Moreover, through particularization of the abstract, the number of particular desires susceptible of satisfaction by means of consumer goods greatly proliferates. Now, in light of this proliferation and of the assumption that most consumer goods are primarily valued as tokens of recognition, it seems logical that a person's search for recognition cannot be fulfilled through the acquisition of consumer goods. Indeed, the seemingly infinite fragmentation of desire both makes it impossible to obtain recognition for every particular desire and tends to devalue the relative importance of obtaining recognition for any individual desire. Thus, once a person embarks on a journey in search of recognition through the acquisition of consumer goods, she seems condemned to enter into an unending series of contractual exchanges without ever achieving the full recognition which she seeks.

The process just described is analogous to the process described by Hegel in the *Phenomenology* by which self-consciousness is led to enter into the struggle between the lord and the bondsman.²⁵¹ As will be remembered, preceding the struggle, self-consciousness was seeking to establish its identity through the appropriation and consumption of external objects. The achievement of identity through this process fails, however, for much the same reason as does the process underlying the search for full recognition through contractual exchange: they both depend for their success on acquisition and consumption of an infinite number of objects. Each of these processes, however, unfolds at a different level of abstraction in the context of Hegel's overall dialectical scheme. Thus, the process whereby the member of civil society seeks recognition through contract, unlike the one whereby self-consciousness seeks identity, involves reciprocal recognition between individual contractors.²⁵² The failure of this process has to be understood, therefore, not as a failure to achieve purely formal equality in recognition, but rather as a failure to obtain recognition as a substantive self-subsistent subject whose identity is self-contained, defined, and fully realized through the exercise of its own

²⁵¹ See *supra* text accompanying notes 107-14.

²⁵² This follows from the fact that abstract right itself presupposes the achievement of intersubjective recognition. See *supra* note 53.

free will. Once again contract leads to formal equality of recognition, but this time at the cost of frustrating the desire for substantive recognition.

A further reversal brought about by the dialectic of contract in civil society concerns the relationship between the subject as consumer and as producer. The constant need to acquire consumer goods through contractual exchanges requires the individual to devote substantial effort to the production of "external" goods suitable for alienation in exchange for coveted consumer goods.²⁵³ Presumably, the individual in civil society produces to be able to consume,²⁵⁴ and consumes, in large measure, to obtain recognition. Consumption alone, however, does not lead to substantive recognition. But through the cunning of reason, production, which is originally viewed as but a necessary means toward consumption, makes a greater contribution to the achievement of substantive recognition than can consumption.²⁵⁵ Indeed, production requires a curbing of desire and a postponement of arbitrary gratification which enhances self-control and hence contributes to the unification and integration of the person who otherwise becomes fragmented in the proliferation and particularization of desire.²⁵⁶ Moreover, production is not only likely to enhance the producer's image of herself but also the image which others have of her.²⁵⁷ Thus, paradoxically, in a world in which persons seek recognition as satisfied consumers, they can actually achieve greater substantive recognition as producers.

The dialectic between consumer and producer is analogous to that between lord and bondsman, particularly as it relates to the realization by the bondsman that in working for the lord he overcomes his fear of death, masters his own environment, and places his own imprint on the products upon which the lord depends for recognition.²⁵⁸ Unlike the bondsman, however, the producer in civil society works for herself as well as for those who consume her products. Also, un-

²⁵³ See *supra* text accompanying notes 197-201.

²⁵⁴ Cf. *Philosophy of Right*, *supra* note 18, para. 196 (Through work we acquire the means to satisfy our particularized needs.).

²⁵⁵ See *id.* para. 199.

²⁵⁶ See *Phenomenology of Spirit*, *supra* note 17, para. 195 (labor is "desire held in check, fleetingness staved off"); R. Plant, *supra* note 31, at 219 ("Labour is crucial to human self-consciousness. . . . Through labour I learn to organize the satisfaction of my desires and intentions and thus I gain a measure of self-control and self-determination.").

²⁵⁷ See *Philosophy of Right*, *supra* note 18, para. 199; R. Plant, *supra* note 31, at 220 ("The development of *self*-consciousness through labour also involves the labour and thus the consciousness—intentions, purposes and projects—of others, because no man can satisfy all the range of his needs through his own labour.").

²⁵⁸ See *supra* text accompanying notes 132-37.

like the bondsman who has not yet achieved recognition, the producer who contracts to alienate her products enjoys relationships of formal reciprocal recognition with all her contract partners. Nevertheless, the critical point that emerges from a consideration of both these dialectics is that, even in the face of formal reciprocal recognition, the uninhibited pursuit of recognition through consumption fails to yield substantive recognition. In addition, to project an identity worthy of recognition, the individual must curb her rampant desire to consume to channel her energies towards the production of goods reflecting her creative potential and her mastery over herself.

In her capacity as a producer, the member of civil society begins to give concrete life—most likely without being aware of it—to Hegel's conception of substantive freedom as dependent on self-restraint.²⁵⁹ Substantive freedom, however, requires that the subject voluntarily assume her duty,²⁶⁰ and this cannot be achieved fully within the perspective of civil society because of its inability to overcome the alienation of the subject from her ethical life. The reconciliation of the subject with her ethical life therefore requires transcending the stage of civil society and entering into the last stage of Objective Spirit, that is, the stage of the state, in which the subject consciously embraces her ethical life and freely chooses to fulfill her universal duty.²⁶¹

With the advent of the state, we come to the end of contract as the dominant intersubjective relationship. The principal reason for this and for Hegel's rejection of the social contract as a means to legitimate the state is that he envisions the state's perspective as a collective one.²⁶² Contract requires arbitrary will and its irreducibly individualistic component.²⁶³ On the other hand, the state, representing the perspective of the community as a whole, cannot be the product of a contract, according to Hegel, because the perspective of society as a whole is that of the universal will *as opposed to* the arbi-

²⁵⁹ See *Philosophy of Right*, *supra* note 18, paras. 149, 149A.

²⁶⁰ See *supra* text accompanying notes 69-70.

²⁶¹ See *Philosophy of Right*, *supra* note 18, para. 260.

²⁶² See *id.* para. 259 (state as self-dependent organism); *id.* para. 260 (in the state individuals "do not live as private persons for their own ends alone" but they "will the universal" and their "activity is consciously aimed at none but the universal end"); *id.* para. 261R (in the state, the individual is "upheld and preserved" insofar as he performs "tasks and services for the state" (emphasis in original)).

²⁶³ See *id.* paras. 75, 75A ("the state does not rest on contract, for contract presupposes arbitrariness"); *id.* para. 258R (criticizing Rousseau's social contractarianism on similar grounds); *id.* para. 281R (a contract of government "is not the guiding principle . . . of the state" and it "stands opposed to the Idea of ethical life").

trary will.²⁶⁴ From the standpoint of the inner logic of the dialectic of ethical life, it is precisely because civil society and its contractual relationships based on the arbitrary will fail to reconcile autonomy and welfare that it becomes necessary to embrace the more comprehensive perspective of the Hegelian state. In other words, because contract and civil society are not self-sustaining, they ultimately depend on the collective noncontractual outlook of the state for their viability.²⁶⁵

To recapitulate: contract cannot be self-sustaining because while it promotes reciprocal recognition, the nature of the recognition which it provides becomes increasingly abstract. Indeed, through the simultaneous operation of the dual process of abstraction of the particular and particularization of the abstract, contract, if left unchecked, would lead to the dissolution of the concrete socially grounded person. Contract tends to reduce the identity of the subject to whom it accords recognition to the purely formal one of the *ego contractans*. On the other hand, contract provides recognition to the diversity of desire by disconnecting particularized wants from their increasingly abstracted owner. Further, to be in a position to grant to others the recognition which they require to reciprocate, the person must be prepared to treat as "external" and to alienate all her possessions, capacities, and attributes except her capacity to contract.

For contract not to lead to the dissolution of the concrete person, it must be constrained by a set of extracontractual values. In particular, what is required to curb the process of abstraction of the particular and particularization of the abstract is a substantive conception of the person capable of transforming equality in recognition obtained through contract into a substantive equality. Moreover, such a substantive conception of the person could also provide a criterion to determine what, in addition to the capacity to contract, should be considered as being inalienable.

To the extent that the contradictions of contract and of civil society find a resolution within the state, it seems logical to assume that the extracontractual values necessary to constrain contract would emerge from the collective perspective of the state.²⁶⁶ Further, since from that perspective the subject voluntarily adopts the communal norms inherent in the ethical life,²⁶⁷ it appears that the requisite extracontractual values are rooted in that ethical life. This raises impor-

²⁶⁴ See *id.* paras. 260-61, 288-89.

²⁶⁵ Cf. *id.* para. 263A (civil society as part of an organism can only survive as subsumed under the state which represents this organism taken as a whole).

²⁶⁶ From a Hegelian perspective, this follows because the state evinces a higher degree of rationality than civil society. Cf. *id.* para. 258 ("The state is absolutely rational . . .").

²⁶⁷ See *id.* para. 260.

tant questions concerning the precise nature of the relationship between the extracontractual norms rooted in the ethical life and contract, and more generally, concerning the place of individual-regarding interests in the context of a stage in the dialectic, in which the subject embraces the perspective of the community as a whole. The principal of those questions is whether the deliberate introduction of extracontractual norms in the context of contractual exchange would merely constrain contract or whether it would tend to eliminate genuine contractual relationships altogether.

It is possible to answer these questions theoretically within the framework of Hegel's dialectical methodology. Indeed, the transcendence (*Aufhebung*) of one stage by another does not entail the elimination of the components of the earlier stage, but merely their recombination to conform to the perspective of the subsequent stage.²⁶⁸ Accordingly, contracts need not disappear in the context of the state. They merely need to be curbed sufficiently to avoid conflicting with the pursuit of the common good.²⁶⁹ It remains difficult, however, to envisage what the practical answers to these questions might be, and Hegel's discussion of the role of the state in the *Philosophy of Right* appears to provide insufficient guidance on this matter.

While Hegel's conception of the state is certainly subject to conflicting interpretations, it seems clear that he envisions the state as the instrument of collective intervention into the sphere of private relationships,²⁷⁰ and yet, at the same time, as also capable of sustaining the individual and her interests.²⁷¹ Indeed, if contractual relationships in civil society lead to crises of overproduction and to the creation of extreme poverty, Hegel maintains that the state must intervene to promote the general welfare.²⁷² Hegel is not explicit, however, on whether such state intervention should generally dismantle contractual relationships or whether it merely should limit them and supplement them with noncontractual relationships. On the other hand, Hegel repeatedly insists that the state is not supposed to crush the individual or to impose on her collectively determined burdens against her will. On the contrary, Hegel envisions the state as an organic whole in which particular interests can be harmonized with uni-

²⁶⁸ See *supra* text accompanying notes 95-96.

²⁶⁹ Cf. *Philosophy of Right*, *supra* note 18, para. 261 (In the context of the state, particular interests are to correspond with the universal, and thereby both the particular and the universal are to be preserved.).

²⁷⁰ See *id.* para. 258 (state, which is absolutely rational, "has supreme right against the individual, whose supreme duty is to be a member of the state").

²⁷¹ See *id.* para. 260.

²⁷² See *id.* paras. 245, 249-50, 255, 255A; R. Plant, *supra* note 31, at 224-26.

versal ones,²⁷³ and insists that in the modern state, unlike in its ancient counterparts, there must be room for "private judgment, private willing, and private conscience" as well as respect for the individual's "inner life."²⁷⁴ What remains difficult to grasp, however, is how the particular interests of the individual come to coincide with the universal will issued from the collective perspective of the state as an organic whole.

One possible way to overcome these difficulties is to view the state in terms of the subject's search for recognition. Although contractual relationships in civil society produce reciprocal recognition, they also tend to distort the identity of the person, making it difficult for her to grasp who she really is.²⁷⁵ The distorted recognition provided by contract fails, in significant part, because it does not account for the collective aspects and ramifications of contractual relationships. This deficiency, however, appears to be surmountable from a collective perspective—namely, that of the state—which is well suited to recognize those aspects of the subject which the individualist vision of the contractor fails to discern. Such a collective perspective based on the ethical life of the community, moreover, does not have to obliterate the individual from its account of social relations.²⁷⁶ It seems entirely plausible that the determination of the subject's identity from the collective perspective of the state requires recognition of persons as individuals. In other words, even from the standpoint of the ethical community taken as a whole, what is irreducibly individual in nature must be recognized as a necessary ingredient in the formation of the social identity of the subject.²⁷⁷

Even if from civil society's perspective the individual is perceived as being severed from the social, while from the state's perspective the individual looms as a necessary aspect of the social identity of the subject, it still may be difficult to formulate a concrete conception of the collective dimensions of what remains irreducibly individual. Indeed, because from the state's perspective all intersubjective relationships must be understood in terms of collective practices, institutions, and norms, it becomes hard to comprehend how something which must be grasped in terms of collective relationships, values, and norms could nevertheless command recognition as possessing an irreducibly individual residue. Some light can be shed on this problem,

²⁷³ *Philosophy of Right*, supra note 18, para. 261.

²⁷⁴ *Id.* para. 261A.

²⁷⁵ See supra text accompanying notes 247-52.

²⁷⁶ This is consonant with Hegel's position in the *Philosophy of Right*. *Philosophy of Right*, supra note 18, paras. 260-61.

²⁷⁷ *Id.*

however, by considering certain mediating functions and institutions which Hegel posits as facilitating the transition between civil society and the state—in particular, Hegel's conception of corporations and his perception of the role of civil servants as agents of the state.

Hegel's conception of corporations, which he considers as an intermediate mediating link between civil society and the state, has roots in Roman law.²⁷⁸ In the broadest sense, the Hegelian corporation is an association of individuals who have certain common interests, and who voluntarily join together to pursue them.²⁷⁹ The Hegelian corporation may be, for example, a commercial or professional association which is better suited to achieve the common ends of its members than the members would by acting alone.²⁸⁰ Although common, the interests of the members of a corporation are particular, not universal.²⁸¹ A corporation is accordingly a collective organization devoted to the pursuit of particular interests, be they the aggregate individual interests of its members or their joint interests as the members of a particular social, economic, or professional class. In any event, because these interests are never universal—that is, because they are never the interests of the state as such—they always stand opposed to other competing individual or class interests.

Hegel emphasizes that membership in a corporation is consensual.²⁸² That means that each member recognizes an identity which she shares in common with every other member.²⁸³ Unlike in a contractual relationship in which mutual recognition is achieved through the exchange of tokens of recognition, in the consensual relationship that binds together the members of a corporation, mutual recognition is expressed through sharing a common identity—although that common identity is circumscribed by the objectives of the corporate association.²⁸⁴ Thus, from the standpoint of its members, the corporation puts collective means at the disposal of particular—and sometimes even purely individual—ends.²⁸⁵ Also, through mutual recognition of their common identity, the members of a corporation may overcome

²⁷⁸ See Heiman, *The Sources and Significance of Hegel's Corporate Doctrine*, in *Hegel's Political Philosophy: Problems and Perspectives* 111, 115 (Z. Pelczynski ed. 1975).

²⁷⁹ *Id.*

²⁸⁰ See *Philosophy of Right*, *supra* note 18, paras. 250-56.

²⁸¹ See *id.* para. 251TN ("the purpose of the Corporation, though universal for its members, in the sense that it is the same for all of them, is still restricted; it is not the purpose of all the members of society but that of a section only").

²⁸² See *id.* para. 254 (the "'natural'" right to earn one's living "is restricted within the Corporation only in so far as it is therein made rational instead of natural").

²⁸³ See *id.* para. 251.

²⁸⁴ *Id.* paras. 251-52.

²⁸⁵ *Id.* para. 252. See *supra* note 281.

the fragmentation of identity of purely contractual relationships, while remaining opposed to the interests of society as a whole. On the other hand, to the extent that the members of the corporation have other individual interests besides those which they hold in common, mutual recognition in terms of their common identity will have to disregard or reject the disparate individual interests which would tend to blur their common interests. Generally, through intermediate institutions such as corporations, it is possible to enhance reciprocal recognition of the individual's particular interests, but only of those particular interests which she shares with a significant number of other individuals. Therefore, institutions such as corporations, while providing collective outlets for individual interests, are likely to promote the most widely shared individual interests (or shape the interests so that they can be shared) to the exclusion of that which is purely idiosyncratic or unique.

According to Hegel, civil servants who are agents of the executive power of the state also play a mediating role. Their role is to maintain "the state's universal interest" and "legality" in the "sphere of particular rights" and to bring these rights "back to the universal."²⁸⁶ Moreover, Hegel points out that a civil servant's tenure is not contractual in nature, but that it is nonetheless consensual. This may seem strange, particularly in light of Hegel's specification that once she has been appointed to her official position, a civil servant's tenure in her post depends on her continuing to carry out its duties in a satisfactory manner.²⁸⁷ Thus, the civil servant's appointment seems to be very much like an employment contract according to which the employee can only be dismissed for cause. Hegel nevertheless insists that the civil servant's relationship to the sovereign for whom she works is not contractual in the sense that it does not involve an expression of arbitrary will. The duty of the civil servant is to carry out the dictates of the universal will, and Hegel asserts that the compensation on which the civil servant must count to satisfy her personal needs should be viewed as being merely secondary in importance.²⁸⁸

By bringing the universal interests of the state to bear on the sphere of private interests, the civil servant deliberately seeks to harmonize the particular interests of the individual with the collective ones of the state.²⁸⁹ Thus, the civil servant is led by the visible hand illuminated by the perspective of the whole to correct the discrepan-

²⁸⁶ *Philosophy of Right*, *supra* note 18, para. 289.

²⁸⁷ *Id.* para. 294.

²⁸⁸ *Id.*

²⁸⁹ *See id.* para. 297A.

cies which the invisible hand of competition has failed to overcome. On the other hand, viewing the matter from the standpoint of the civil servant rather than from that of the state, the realization of self-interest may be the end and the promotion of universal interests only the means.²⁹⁰ In that case, although the universal would, from the civil servant's perspective, be subordinated to the particular, it would nevertheless have to be accorded recognition as a prerequisite to the satisfaction of individual needs. Thus, as in the case of the corporation, the pursuit of collective means by the public servant is a necessary condition to the achievement of purely individual interests. In the case of the corporation, where the collective means involve the pursuit of common interests rather than universal ones, for the civil servant it is the universal that appears at the service of the individual from the subjective standpoint, while the contrary appears to be the case from the more comprehensive standpoint of the state.

One plausible conception of how the Hegelian state might reconcile the individual and the community and constrain contractual relationships without eliminating them relies on a combination of the approaches followed respectively by corporate associations and civil servants. According to this conception, the state, like a corporation, taps on the particular interests that are widespread through society. The state focuses on the common interests that have already found collective expression through corporate associations. But unlike a corporation, the state does not merely provide collective means to achieve particular interests. Instead, it channels particular common interests towards universal objectives, and thus transcends classes and other group-related differences which pit diverse corporate interests against one another.²⁹¹ Just like the corporation, the state reverses the fragmentation of recognition by fostering consent regarding a common identity. But whereas the recognition promoted by the corporation centers around a common identity that clashes with the identity of other groups within society, the recognition obtained from the standpoint of the state projects a much broader common identity shared by all groups within society.²⁹² Moreover, from the perspective of the person, the state carries forward the same process undertaken by corporate associations, namely the emphasis and en-

²⁹⁰ See *id.* para. 294.

²⁹¹ Cf. *id.* para. 288 (The "circles of particular interests" pursued by corporations "must be subordinated to the higher interests of the state.").

²⁹² To the extent that the state is defined in relation to other states, however, its identity does not seem to be of a different kind than that which is characteristic of corporations. See *id.* para. 322 ("Individuality is awareness of one's existence as a unit in sharp distinction from others. It manifests itself here in the state as a relation to other states . . .").

couragement of certain individual interests at the expense of certain others. This process, which permits the individual to choose certain of her interests over others, and which also leads her to transform her chosen interests as she enters into new intersubjective alliances to better pursue them, is purely voluntary and consensual. Persons consent to join ever larger groups sharing common interests to obtain wider recognition of a more extensive common identity.²⁹³

By sharing identity, however, the person may lose sight of the differences underlying the notion of individuality. (Any distinct identity depends on both identity and difference, and even the broadest based common identity as members of the same state involves establishing oneself as different from other states and their members.²⁹⁴) The more one seeks to identify with the members of one's group, and the more extensive that group becomes, the less one is likely to achieve recognition as an individual who is in some significant sense different from all the other individuals. Accordingly, as a person embraces the universal interests of the state, she needs to be recognized as possessing interests, other than those she shares with all the other members of the state, to retain a sufficient degree of individuality. And she can achieve this if, like the civil servant, she can pursue her particular interests through propagation of the universal interests generated from the perspective of the state. In other words, having internalized the common identity shared by all the members of the state, she can seek individual recognition through pursuit of her particular interests, without risking the fragmentation of identity to which an unconstrained regime of contract seems bound to lead.

The double movement from the particular to the universal and back to the particular, which makes possible reciprocal recognition both in terms of a substantive common identity and of different but equivalent particular interests, depends for its viability on the existence of two conditions. The first relates specifically to the process that leads from the particular to the universal. It requires that the logical passage from purely individual interests to common interests and then finally to the universal interests of the state be both justified and voluntarily undertaken. In the context of Hegel's dialectic, both of these requirements are met. The movement from the particular to the universal is not only justified but necessary pursuant to the "onto-

²⁹³ Cf. *id.* para. 260 (In the context of the state, individuals "pass over of their own accord into the interest of the universal.").

²⁹⁴ See *supra* note 292.

logic" of the subject.²⁹⁵ On the other hand, such movement is voluntary in that each person consents to it, as part of her rational progression towards the realization of her substantive freedom.²⁹⁶ Finally, this movement is given concrete shape by the norms and customs which are rooted in the ethical life, which the subject internalizes and to which she increasingly grants greater conscious recognition.²⁹⁷

The second condition relates to the movement from the universal back to the particular, and requires that realization of the universal leave room for indeterminacy. If from the perspective of the state—according to which all intersubjective relationships must be understood in terms of collective practices, institutions, and norms²⁹⁸—there is no room for indeterminacy, then it would appear that in principle the individual could be completely understood in terms of the collective forces that delimit her concrete identity. In that case, the individual would be completely reducible to her collective determinants, and contractual relationships would be rendered completely superfluous. On the other hand, assuming there is room for indeterminacy, then even though the individual is ultimately the product of a confluence of collective forces, it nevertheless would be possible for there to be certain purely individual determinations. Thus, if universal interests do not rigidly prescribe every particular course of conduct, and if two or more possible courses are equally compatible with the achievement of universal interests, then there is some room for the exercise of arbitrary will in the sphere of private interests.²⁹⁹ Moreover, under such circumstances the movement back from universal to particular makes sense since it permits increased recognition of individual identity—or more precisely, of individual difference—in ways that are not inconsistent with recognition of the subject's common universal identity. And to the extent that there is indeterminacy, contractual relationships would be legitimate provided that they did not conflict with the universal interests that emerge from the ethical life of the state.

It is not clear whether Hegel's system allows for the kind of indeterminacy discussed here. Nevertheless, it is arguable that it does, for otherwise it would be difficult to imagine how transcendence of the perspective of civil society by that of the state could involve preserv-

²⁹⁵ See *Philosophy of Right*, supra note 18, para. 261 (state as logical culmination of particular interests and of civil society).

²⁹⁶ See *id.* paras. 149, 149A.

²⁹⁷ See *id.* paras. 264-65.

²⁹⁸ See supra text accompanying notes 277-78.

²⁹⁹ Such will would be "arbitrary" in the sense of not being prescribed by the dictates of the universal will, but not "arbitrary" in the sense of being opposed to the universal will.

ing—in accordance with Hegel's notion of *Aufhebung*—some of the particular interest prevalent in civil society. Also, Hegel maintains that in the modern state particular interests of the individual can co-exist with universal interests.³⁰⁰ Unless one is prepared to argue that the perspective of the state allows for a perfect alignment between the particular and the universal, it seems more plausible to appeal to indeterminacy to explain the continued vitality of individual interests, even after full awareness of the requirements imposed by the pursuit of universal interests.

The advent of the state's perspective, in Hegel's system, does not eliminate the need for contractual relationships. Instead, it reserves for contract a reduced but nonetheless important task, namely that of cementing the realm of the particular after the conscious absorption of the universal standpoint. Moreover, in the Hegelian state, contract is both dependent on, and to be contrasted with, consent. Indeed, absent consent to be bound by the norms inherent in the ethical life, the perspective of the community would simply be imposed and thus obviate the need for contract. On the other hand, the consent involved in the conscious adoption of common norms is different from the agreement reached between the parties to a contract. Consent to common norms requires acceptance of them based on a conviction that they are valid. And if each person is rational, she can independently conclude that the common norms in question are valid and that she should therefore follow them.³⁰¹ On the other hand, contractual agreement is the product of compromise rather than of conviction. The parties to a contract settle for its terms of exchange because they cannot otherwise achieve what they deem to be more advantageous terms.³⁰² Further, through consensual acceptance of the norms of the ethical life, individuals can forge a common identity which constrains the nature and scope of valid contractual relationships. Within the bounds established by such constraint, contract provides reciprocal recognition for the differences that allow members of the state to retain an element of irreducible individuality without jeopardizing their continuing mutual recognition in terms of their common identity. In sum, if properly constrained, contract can contribute to the simultaneous survival of an individual and the community.

CONCLUSION

The preceding analysis demonstrates how contract as mutual

³⁰⁰ See *supra* note 97 and text accompanying note 191.

³⁰¹ Cf. *Philosophy of Right*, *supra* note 18, para. 258 ("The state is absolutely rational.").

³⁰² See *supra* text accompanying notes 62-63.

recognition serves to maintain an equilibrium between individual-regarding and community-regarding interests in Hegel's system. Paradoxically, contract is stronger and more enduring when bounded by noncontractual norms than when placed in a normative universe in which all legitimate intersubjective relationships are ultimately contractual in nature. This is made plain by the contrast between Hobbes's contractarianism, which leads to inevitable inconsistency, and Hegel's dialectical juxtaposition of contract with noncontractual norms, which provides contract with a more secure, albeit a more limited, legitimate role. Viewed from the perspective of the Hegelian system, contract promotes both the individual and the communal by pitting them against each other. Moreover, contract, which finds its logical place among abstract rights, and owes its existence to its original sociopolitical insertion in the realm of civil society, can only survive through the mediation of the noncontractual state.

The fact that contract occupies a meaningful place in Hegel's ("onto-logical") system does not necessarily imply that it must have some coherent meaning in its contemporary use.³⁰³ Indeed, it is not clear whether contract can continue to serve as a legitimate vehicle for the reconciliation of the individual-regarding and collective values once the particular trappings of Hegel's dialectic of the subject have been removed. More specifically, because of the convergence between logic and ontology in Hegel's system, the validity of his methodology seems inextricably intertwined to the validity of his system taken as a whole. Therefore, to the extent that some of Hegel's ontological conclusions appear to be unacceptable to the contemporary mind, the usefulness of his methodology is questionable. As Charles Taylor has observed, this presents a serious question, for Hegel's actual synthesis has dissolved and become obsolete.³⁰⁴ In particular, Hegel's notion of *Geist* as cosmic spirit in which reason and reality completely overlap seems highly implausible today.³⁰⁵

Even if everything else within Hegel's system were left in place, the denial of the existence of the cosmic spirit, and the refusal to accept that the real is rational and the rational real, would suffice to deprive all intersubjective relationships of meaning. Indeed, within Hegel's system, the meaning of a social practice can only be understood in relation to the product or end result of the dialectical process which generates the practice in question.³⁰⁶ Moreover, because of the

³⁰³ See *supra* note 4.

³⁰⁴ C. Taylor, *supra* note 16, at 537-38.

³⁰⁵ See *id.* at 547, 551.

³⁰⁶ See *supra* text accompanying notes 26-35 & 98.

dialectic between the part and the whole, the initial position that marks the point of departure of the dialectical process towards a particular end result can only be located in relation to the whole. Thus, if one denies that *Geist* or reason necessarily propel history towards any particular definitive end result, no initial position can be firmly established and no social practice given more than unstable, fleeting, and contradictory meaning.

Notwithstanding these difficulties, Hegel's conception of contract may yet prove to be particularly well suited to contribute to a proper understanding of contemporary contractual relationships. Indeed, the rejection of *Geist* does not foreclose the postulation of an initial position and end result that closely approximate those that emerge in the Hegelian conception of contract. Thus, one might postulate as the relevant initial position that of the abstract rights-endowed person who seeks to satisfy her desires. As end result, on the other hand, one might postulate a sociopolitical milieu in which an equilibrium is struck between individual autonomy and communal solidarity, without recourse to any cosmic spirit. Moreover, the adoption of these postulates is justifiable in light of widely shared contemporary norms and beliefs.

The abstract individual who seeks to satisfy desire is a partial construct of the whole person, which has come to occupy a prominent position in contemporary political philosophy.³⁰⁷ It is thus the abstract person who is most frequently invoked as the subject of civil and political rights and of political equality in liberal political theory.³⁰⁸ Further, the abstract person is often made the subject of legal and economic relationships in general,³⁰⁹ and of contractual relationships, in particular.³¹⁰ Consequently, by placing the abstract person in the initial position—which is always partial and one-sided—one not only draws upon a ubiquitous figure in contemporary liberal theory, but also posits that figure as an incomplete and unidimensional

³⁰⁷ The abstract person who is the protagonist of contemporary individualistic political philosophy has its origins in the writings of Hobbes and Locke. See T. Hobbes, *supra* note 38; T. Hobbes, *supra* note 39; J. Locke, *supra* note 7; see also C.B. MacPherson, *The Political Theory of Possessive Individualism* (1962) (notion of possessive individualism as a central assumption of liberal political theory). Among its best known contemporary exponents are J. Rawls, *supra* note 250, and R. Nozick, *Anarchy, State, and Utopia* (1974).

³⁰⁸ See, e.g., J. Rawls, *supra* note 250.

³⁰⁹ See C. Dyke, *Philosophy of Economics* 138 (1981) ("For the purposes of the market we are 'buyer,' 'seller,' 'producer,' or 'consumer.' These simply specify the activities of the rational economic man within the market system. Any further understanding of us as people is barred by the theoretical constraints on how the market must be described.").

³¹⁰ See *supra* note 21.

representation of the fully constituted person who engages in a multitude of concrete intersubjective relationships.

Postulating as end result some kind of synthesis between individual autonomy and community-oriented solidarity also appears to be consonant with plausible contemporary normative aspirations.³¹¹ From a prescriptive standpoint, it seems reasonable for members of contemporary societies to be dissatisfied with the consequences of individualism as well as with those of collectivism.³¹² Accordingly, it is plausible for such persons to postulate as desirable a state of affairs that would compromise neither the dignity of the individual nor the integrity of the community. From a descriptive standpoint, on the other hand, while such a synthesis between individual and community may be more difficult to conceive, there seems to be no a priori reason why it should not be feasible. It is beyond the scope of this Article to attempt to describe what a society having reached such a synthesis might look like. For present purposes, it should suffice to recall that a certain degree of indeterminacy may allow some measure of purely individual input in the Hegelian state, in which all intersubjective relationships are shaped by communal norms,³¹³ and to note that there seems to be no intrinsic reason why a similar degree of indeterminacy might not lead to a similar result in a contemporary society.

A much more serious obstacle to the adaptability of the Hegelian paradigm of contract as mutual recognition for purposes of the legitimation of contemporary contractual relationships stems from the rejection of Hegel's claim that there is a necessary nexus between the rational and the real. Hegel's own conception of contract depends for its legitimacy on the adoption of noncontractual norms which emerge from the ethical life of the modern state.³¹⁴ Moreover, persons *consent* to these noncontractual communal norms because they become convinced of their inherent rationality.³¹⁵ And as these norms are internalized, they constrain contractual relationships and to prevent the excesses associated with unrestrained contractual transactions. Because these norms are voluntarily adopted,³¹⁶ the constraints which they generate are themselves consensual in nature, with the consequence that the restraint imposed on individual contractors is in es-

³¹¹ One attempt to articulate a more communitarian vision in the context of contemporary American political philosophy is M. Sandel, *Liberalism and the Limits of Justice* (1982).

³¹² See A. Smith, *supra* note 214.

³¹³ See *supra* text accompanying notes 298-300.

³¹⁴ See *supra* note 87.

³¹⁵ See *supra* text accompanying notes 90-91.

³¹⁶ See *Philosophy of Right*, *supra* note 18, para. 260.

sence self-restraint. With the rejection of the claim that there is a necessary nexus between rationality and communal norms, however, two major problems immediately arise. First, if community norms are viewed as irrational, arbitrary, or purely contingent, there would seem to be no (positive) reason for voluntarily consenting to them. Second, if community norms need not be rational, they may well impose either too many or too few restraints on the individual's legal capacity to contract. While the effect of the second problem on contractual relationships is obvious, that of the first may not be. Nevertheless, it is just as real: where individuals are coerced to accept existing communal norms, there seems bound to be a substantial devaluation of the importance of consensual relationships in general.³¹⁷ Under such circumstances, even if contractual relationships were not dramatically curtailed, they would probably rest on a precarious foundation.

While it is impossible to adequately address these problems here, it should be emphasized that they are by no means inherently insoluble. Indeed, rejection of the existence of a necessary correlation between the rational and the real does not foreclose the consensual adoption of rational communal norms, but only the assumption that the communal norms produced by the ethical life of the modern state must be automatically rational. Further, there are contemporary ethical theories, such as those of Rawls and Habermas, which provide that legitimate intersubjective ethical norms must ultimately rest on the consent of those to whom they are meant to apply.³¹⁸ Accordingly, in contemporary ethical theory, it is, at least in theory, possible to conceive of a domain of legitimate contractual relationships bounded by a set of noncontractual norms which are ultimately consensual in nature.

In the last analysis, the proper divide between contract and non-contract is unlikely to be the same today as it was in Hegel's time. Nevertheless, the paradigm of contract as mutual recognition may well prove fruitful in any attempt to determine the proper domain of contemporary contractual relationships consonant with an ethical commitment to the synthesis between individual autonomy and communal solidarity. In the best of cases, Hegel's theory will indicate how contract can contribute to the achievement of such a synthesis.

³¹⁷ Cf. Rosenfeld, *supra* note 3, at 805-20 (arguing that contractarian individualism affords greater support to contractual relationships than do rival individualistic paradigms).

³¹⁸ See 1 J. Habermas, *The Theory of Communicative Action* (1984); J. Rawls, *supra* note 250; J. Habermas, *What Is Universal Pragmatics?*, in *Communication and the Evolution of Society* 1-68 (1979); see also T. McCarthy, *The Critical Theory of Jürgen Habermas* 306 (1978) (consensus evolves from undistorted communication).

In the worst of cases, if the enterprise ultimately fails and the synthesis remains elusive, Hegel's insights should at least contribute to an understanding of why contemporary society might be unable to promote equally the interests of the individual and those of the community.

